

adv 49#1

(70)

Abstract

49 I.A. 70

No. 11882

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

C. J. McMAHON, d/b/a C. J.)	
McMAHON MASONRY CONTRACTOR,)	
)	
Plaintiff-Appellant,)	
)	
vs.	)	Appeal from the
	)	Circuit Court of
CLARA M. NIELSEN and WALTER B.	)	Winnebago County.
NIELSEN, d/b/a NIELSEN OIL COMPANY,)	
)	
Defendants-Appellees.)	

ABRAHAMSON, P. J.

This is an appeal by Plaintiff from a judgment in favor of the Plaintiff ordering the Defendants to pay to the Plaintiff the sum of \$1012.60, an amount which the Defendants admit was due and owing.

In February of 1959 the Plaintiff, a subcontractor, while working on the Defendants' gasoline filling station, gave an estimate for an addition to the station, which totaled \$9445.84. As the work progressed on the addition many structural changes and modifications were made upon the request of the Defendants. Construction was completed in the year 1959. Defendants, prior to the completion, paid \$10,000 on account and in December of 1959 requested the contractor to supply an itemization for the

NO. 11882

IN THE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM FOR THE COURT

RE: [Illegible]

Plaintiff: [Illegible]
Defendant: [Illegible]

CLAUDE A. [Illegible] et al.
vs.
[Illegible]

[Illegible]

1. This is an application for summary judgment.

2. The facts are as follows: [Illegible]

3. The Defendant admits that [Illegible]

4. [Illegible]

5. In support of this motion, the Plaintiff offers:

6. While working on the defendant's [Illegible] [Illegible] have

7. an estimate for an addition to the station, which totaled \$2442.84.

8. As the work progressed on the addition, many structural changes

9. and modifications were made upon the request of the Defendant.

10. Construction was completed in the year 1952. Defendant, prior

11. to the completion, paid \$10,000 on account and in December of

12. 1952 requested the contractor to supply an itemization for the

work done, On February 20, 1960, an itemized statement was forwarded or delivered to the Defendants showing a complete detail of all material, work and services performed totaling \$12,482.98 which included an item of 10% entitled "mark up", persumably a contractor's fee, indicating a balance due of \$2482.98 after crediting the \$10,000 previously paid. On March 28, 1961, the contractor forwarded a statement indicating a balance due of \$2482.98. This statement was returned through the mail by the Defendants or one of them to the Plaintiff with a notation thereon not deducted for gas, tires, grand opening adv. \$235.56. " It showed the \$235.56 subtracted from the statement indicating a balance due of \$2247.42. In April of 1961 Defendants paid the sum of \$50 to apply on account and in May of 1961 a like amount was paid.

The original complaint seeks recovery in the amount of \$2247.42 on the theory of an account stated. The trial court, after hearing was commenced, gave leave to the Plaintiff to file an amendment to the complaint on a quantum meruit basis and entered judgment in the amount of \$1012.60 admitted to be due by the Defendants' answer, disallowing the mark up charge or contractor's fee of 10%, itemized in the statement.

The following facts have been considered in the determination hereinafter made on the issue of an account stated. The \$10,000 payment made by the Defendants prior to the completion of the building appears to be inconsistent

with the Defendants' position that the estimate of February of 1959 is an express contract; the acquiescence to the amount claimed due by the return of the statement of March of 1961 by Defendants seeking credit for tires, etc. in the amount of \$235.56 indicating a balance due to the Plaintiff of \$2247.42; payment of \$50 in April and a like amount in May of 1961; failure to make any objection to the account as stated from February of 1960, the date of the original itemized statement to the time of filing the answer to the complaint on October 24, 1961.

We conclude that the Plaintiff has substantiated a recovery on the basis of an account stated. In *Canadian Ace Brewing Co. v. Swiftsure Beer Co.*, 17 Ill. App. 2d 54, the court held that an account stated is an agreement between two parties which constitutes a new and binding determination of the balance due on indebtedness arising out of previous transactions of a monetary character, containing a promise, express or implied, that the debtor shall pay the full amount of the agreed balance to the creditor, citing *The State v. Illinois Central R. R. Co.*, 246 Ill. 188, 241 (1910) and others. The agreement must, of course, manifest the mutual assent of both the debtor and the creditor, although such assent may be inferred from the retention by one of the parties of a statement of account rendered by the other, for an unreasonable time and without objection. *Pure Torpedo Corp. v.*

with the Defendant's position that the said sale of property of 1929 is an express contract; the agreement was to the amount claimed due by the return of the statement of March 1931 of Defendant seeking credit for taxes, etc. in the amount of \$232.50 indicating a balance due to the Plaintiff of \$232.50, payment of \$50 in April and a like amount in May of 1931, failure to make any objection to the account as stated in February of 1931, the date of the original statement being the time of filing the answer to the complaint in October 1931.

We conclude that the Plaintiff has established recovery on the basis of an account stated. In *Canadian Ace Brewing Co. v. Swift's Beer Co.*, 17 Ill. App. 2d 561, the court held that an account stated is an agreement between two parties which constitutes a new and distinct consideration of the balance due on indebtedness arising out of previous transactions of a monetary character, containing a full and express or implied, that the debtor shall pay the full amount of the agreed balance to the creditor, citing *The State v. Illinois Central R.R. Co.*, 240 Ill. 100, 21 (1910) and others. The agreement must, of course, manifest the mutual assent of both the debtor and the creditor, although each assent may be inferred from the retention by one of the parties of a statement of account rendered by the other, for an understanding time and without objection. *Fate Torpedo Corp. v.*

Nation, 327 Ill. App. 28 (1945).

In view of our finding that the Plaintiff should recover on the principle of an account stated it is unnecessary to review the arguments or authorities pertaining to recovery predicated on an express contract or on the theory of quantum meruit contained in the briefs.

Plaintiff claims interest from and after March 28, 1961. Ill. Rev. Stats. 1961, Chap. 74, Section 2. Defendants have failed in their brief and argument to answer this issue and we assume that the Defendants concede this point.

For the reasons given the judgment of the trial court is reversed and the cause is remanded with directions to enter a judgment in the sum of \$2247.42 together with interest at the rate of 5% from March 28, 1961.

JUDGMENT REVERSED AND REMANDED
WITH DIRECTIONS.

CARROLL, J. and MORAN, J., concur.

In view of our finding that the Plaintiff should recover on the principle of an account stated it is unnecessary to review the arguments or authorities pertaining to recovery predicated on an express contract or on the theory of estoppel. The facts contained in the briefs.

Plaintiff claims a interest from a note dated 1901, 28, 31. Ill. Rev. Stat. 1901, Chap. 47, Section 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

For the reasons given the fact that the Plaintiff has failed in their briefs and argument to answer the issue and we deem it that the Plaintiff concedes the point.

Plaintiff's briefs and argument are hereby overruled and the case is remanded with the costs to the Plaintiff.

CARROLL, J. and ROBERT, J. concur.

Adm 49#1

(101)

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TERM NO. 64-16

49 I.A²101

AGENDA NO. 30.

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Defendant In Error,

vs.

ROBERT CARPENTER,

Plaintiff In Error.

Error to Appeal
from Circuit Court
of St. Clair County

Hon. Richard T. Carter,
Judge Presiding.

REYNOLDS, J.

This case comes to this court on a writ of error to the Circuit Court of St. Clair County. Plaintiff in error, Robert Carpenter was indicted for committing an attempt, in that he, with intent to commit the offense of murder, did shoot and wound one John Pyle.

Trial was had before a jury and a guilty verdict being returned by the jury, defendant was sentenced to a term of imprisonment of not less than 8 years nor more than 12 years.

In the writ of error, plaintiff in error claims a faulty indictment, admission of prejudicial testimony and that the evidence does not support the verdict of guilty.

The evidence showed that John Pyle was working as a bartender at Club 88 in St. Clair County on June 23, 1963.

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Working with him behind the bar was Vera Holton. Carpenter came in and went to that part of the bar where Pyle was working. Pyle told him he had orders not to serve him and Carpenter turned around and started out. Pyle came from behind the bar and then Carpenter turned around and started firing at him. Pyle was struck with two bullets, one in the chest and one in the neck. The gun was identified as one Carpenter handed to Thomas Werndle, shortly after the shooting. At that time Carpenter told Werndle to get rid of the gun. Carpenter was picked up by the police shortly afterwards. The only other eye-witness to the shooting was Vera Holton, the other bartender, who corroborated the testimony of Pyle as to what happened. There were others in the club, but they did not see the actual firing of the gun by Carpenter and the wounding of Pyle. The defendant did not testify and offered no evidence.

The chief point raised by this writ of error is the admission of testimony on the part of the People as to the extent of wounds suffered by Pyle, his lying on the floor bleeding and similar testimony. Plaintiff in error claims this testimony was in error, in that it was inflammatory and highly prejudicial to him.

Pyle was allowed to disrobe and show the jury a scar where one bullet entered his chest, and another where the bullet emerged. He also showed the jury where one bullet entered his neck and where it emerged. This testimony was objected to but the court permitted it.

Vera Holton was asked these questions and gave these answers:-

Q. Could you see any evidence of bleeding on Mr. Pyle?



A. Yes.

Q. What part of his body?

A. Right Here.

Q. In the chest?

A. Yes.

Q. Could you see any indication of a bullet wound of any kind or just blood?

A. Just blood.

The defense made no objection to this testimony and made no motion to strike it.

Jack Hardin, an employee of Club 88, testified he saw Pyle lying on the floor and that he was bleeding from the chest. This testimony was not objected to.

The case of The People v. Nickolopoulos, 25 Ill. 2d 451, presented a similar state of facts. The defendant in that case shot one Frank Kallianiotis and testimony of the investigating officer that when he arrived at the scene of the shooting he found Kallianiotis lying on the floor and his shirt was bloody, was admitted. Over the objection of the defendant, the officer testified that when he lifted Kallianiotis he observed blood on the floor and when he removed him from the stretcher at the hospital he observed blood on the stretcher. Kallianiotis was permitted to testify that as a result of the shooting he was paralyzed in his left leg and had seven holes in his intestines.

The court in that case held that a gun is a deadly weapon per se and one who deliberately fires a gun at or towards another person, either with malice aforethought or with a total disregard of human life, may be convicted of assault with intent to kill the



person so attacked, Irrespective of the extent of the Injuries inflicted. Citing People v. Wilson, 342 Ill. 358. The court held the admission of evidence showing blood on the victim's clothing, the floor and the stretcher and the evidence of the extent of the victim's injuries was irrelevant and improper. The court in reversing the judgment and remanding the cause for new trial said the erroneous evidence was of such a nature as to be highly prejudicial to the defendant. The character of the evidence, the shooting and the weapon employed all are similar in that case to the instant cause. In this case, the victim was permitted to show his scars to the jury and other witnesses testified to seeing blood and that the victim was bleeding. Under the rule as announced in the Nickolopoulos case such evidence was irrelevant and improper and highly prejudicial.

The rule is different where the weapon used is not a deadly weapon per se. In such cases, it is proper to show the nature and extent of the wounds and such other testimony necessary to acquaint the jury with all the facts to show malice or a disregard for human life. Such a case was The People v. Shields, 6 Ill. 2d 200, where the victim was knocked down and kicked. In The People v. Coolidge, 26 Ill. 2d 533, the defendant used a bottle and a knife. In the case of The People v. Carter, 410 Ill. 462, a knife was used.


Because of the admission of irrelevant and improper evidence in this cause, the same is reversed and remanded for a new trial. The other grounds raised in the writ of error need not be considered.

Reversed and remanded for new trial.

Dove, P. J. and Wright, J. Concur

PUBLISH ABSTRACT ONLY

FILED
MAY 29 1964
James O. McLaughlin
CLERK OF THE APPELLATE COURT
FIFTH DISTRICT OF ILLINOIS



49310

V.

Defendants-Appellants.

APPEAL FROM THE
SUPERIOR COURT
OF COOK COUNTY.

PER CURIAM.

First Federal Savings and Loan Association, the plaintiff-appellee, moved to dismiss this appeal because of the deficiency in both form and substance of the appellants' abstract.

The defendant, 4800 Marine Drive, Inc., held title to the land at that address. It leased the premises to Holiday Lodge, Inc., for the purpose of building, furnishing and operating a motel. The plaintiff loaned 4800 Marine Drive, Inc., \$750,000.00, secured by a first mortgage, which was to be used in constructing the motel. A few months after the motel was completed involuntary bankruptcy proceedings were instituted against Holiday Lodge, Inc., and a receiver in bankruptcy took possession. Thereafter, 4800 Marine Drive, Inc., defaulted on its loan and the plaintiff foreclosed.

In the foreclosure proceedings a counterclaim for \$350,000.00 was filed by Morris Bromberg, the principal stockholder of 4800 Marine Drive, Inc., and Holiday Lodge, Inc. The import of the counterclaim was that First Federal undertook to act as the construction loan disbursing agent for the purpose of building the motel, but had negligently and improperly disbursed the loan by unauthorized payments

made to the contractor and to subcontractors; that Bromberg had advanced \$275,000.00 and had issued notes in the amount of \$65,000.00 to subcontractors for "extras" not included in the original plans and specifications; that he made these payments to prevent mechanic lien claims against the property; that he made the payments in reliance upon the plaintiff's due care in supervising the total expenditures so that the balance would be adequate to complete the building; that the plaintiff breached its contract and was negligent in its supervision of the expenditures; that Bromberg was entitled to recoupment for the payments he had made, and that because of these payments he was entitled to a lien on the property superior to the plaintiff's. 4800 Marine Drive, Inc., adopted the same counterclaim and asked for the same relief.

The complaint for foreclosure and the counterclaim were referred to a master in chancery. The master found for the plaintiff and against the counterclaimants on all the issues raised by the pleadings. The chancellor overruled the exceptions to the master's report and entered a decree which found that \$949,426.30 was due the plaintiff. The court ordered the property sold and a master's deed delivered to the purchaser.

While we might overlook the deficiencies of the abstract as to form, which deficiencies the defendants admit and to some degree are willing to correct by filing additional documents, the deficiencies as to substance cannot be waived. We have carefully compared the abstract with the record and have found it to be woefully inadequate. The record is 1383 pages in length; the exhibits are over 300 in number. The transcript

of the proceedings before the master fills over five volumes and comprises 1021 pages. With the exception of 22 pages, which represent the testimony of six lien claimants, the balance of the transcript consists of the controversy between the parties. The abstract reduces all of this to 11 pages.

The plaintiff called ten witnesses, the defendants four. Of the latter, two were witnesses called under section 60 of the Practice Act, who also testified in rebuttal for the plaintiff. The abstract mentions only three of the plaintiff's witnesses. Although all three testified at considerable length, the testimony of one of them is given just one line and the testimony of the other two is condensed into four pages. Bromberg testified in his own behalf and was also called by the plaintiff in rebuttal. His testimony, which took over 500 pages in the transcript, is compressed to seven pages in the abstract.

In their objections to the plaintiff's motion to dismiss, the defendants explain their failure to abstract more of the testimony by saying: "For the purposes of the appeal, whether we agree or not, we accept the findings of fact made by the Master." They state that their case rests upon erroneous conclusions of law, and "whether or not the testimony of certain witnesses contradicts the testimony of other witnesses is of no relevance." However, a review of the defendants' brief belies this position. The brief repeatedly takes exception to the master's findings of fact with critical observations such as:

"There is not one iota of evidence in the record to show...."

"...the Master's unsupported finding...."

"The uncontradicted evidence before the Master also disclosed...."

"The Master's report found...even though there is no iota of evidence in the record...."

"Notwithstanding the cumulative force of the evidence, the Master found...."

"Yet in the face of these admitted facts the Master...."

The glaring failure to abstract the testimony of some of the witnesses and the failure to fully abstract the testimony of the others cannot be excused. A decision in this case could not be made without checking the accuracy of the master's findings of fact which appear to have been based in part on the credibility of the witnesses. Furthermore, it would be impossible to understand and most difficult to correlate the exhibits without continual recourse to the testimony in the transcript. One hundred and thirteen plaintiff's exhibits were marked for identification and 206 defendants' exhibits were so marked. Almost all were received in evidence, but only a portion of them are identified in the abstracted testimony.

The abstract is the pleading of the party in a court of review and it must contain and adequately present whatever is sought to be reviewed. McCormack v. Haan, 23 Ill. App. 2d 87, 161 N.E.2d 599. A court of review is not required to search the record for the purpose of reversal. Jackson v. Gordon, 37 Ill. App. 2d 41, 184 N.E.2d 805; Russell v. Halyama, 27 Ill. App. 2d 359, 170 N.E.2d 8. In the present case it would be impossible to evaluate the defendants' contentions without constant reference to the record.

In their objections to the motion to dismiss the defendants state:

"...if Petitioner believes that we have inadequately abstracted the matters necessary for a determination of the issues before this court, it has the privilege conferred by the rules to file an additional abstract."

In Cribben v. Interstate Motor Freight System Co., 38 Ill. App.

2d 123, 186 N.E.2d 100, this court said:

"The appellants cannot sidestep the obligation of filing a sufficient abstract because rule 6 permits the appellee to file an additional abstract. Where there has been a sincere effort to present fully and fairly every error relied upon for reversal, a merely defective abstract will be overlooked and an additional one which cures defects and supplies deficiencies will be welcomed; but the initial responsibility of an appellant never shifts to the appellee, the latter is never compelled to do what the former should have done."

The motion of the appellee to dismiss this appeal will be sustained.

Appeal dismissed.

Abstract only.

(286)

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49090

CONSTANTINE CLOSTERIDES, et al.,

Plaintiffs-Appellants,

v.

HAROLD DALTON and MICHIGAN EXPRESS, INC.,
a Michigan corporation,

Defendants-Appellees.

49 I.A. 286

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order denying plaintiffs' post-trial motion for a new trial and from an order of the court directing a verdict dismissing defendant, Michigan Express, Inc., from the case. The action was brought for damages to person and property by Constantine Closterides and others who were passengers in a car, against Harold Dalton, a truck driver, and Michigan Express, Inc., the alleged owner of the truck.

The circumstances surrounding the accident are for the most part undisputed. During the afternoon of November 9, 1955, plaintiffs were driving on Highway 20, a two lane highway, in a curvy and hilly territory from Rockford to Belvidere at from 50 to 60 miles per hour. They approached a large semi-trailer-truck operated by Harold Dalton and, as plaintiffs testified, after following it for some time they blew their horn and attempted to pass the truck. The truck turned to the left a disputed distance while attempting to pass a small dump truck which was proceeding slowly in front of it. Upon perceiving plaintiffs' car the semi turned back into the right hand lane. Plaintiffs charge the semi's action in turning to the left forced them further to the left causing them to lose control of their car. They careened for 400 to 1000 feet down the road until finally snapping a telephone pole. The evidence shows there was no contact between the semi and plaintiffs' car.

Harold Dalton testified he did not hear plaintiffs' horn, turned on his turn signal before moving out, and did not see

plaintiffs in his mirror when he started to pass the dump truck. Upon a second look in the mirror he saw plaintiffs' car approaching to pass, he turned back to the right and stopped behind the dump truck which was in the process of making a right hand turn.

The errors brought to our attention fall into two categories: (1) those concerning the trial and verdict for defendant, Harold Dalton; and (2) those which pertain to the dismissal of Michigan Express, Inc. from the case. We believe that if the liability of Harold Dalton was fairly tried and the jury returned a verdict for Harold Dalton in conformity with the evidence, the direction of a verdict for defendant, Michigan Express, is of no concern whether done correctly or not. An examination of the pleadings discloses that Michigan Express was not charged with independent negligence but only with liability on a respondeat superior basis. A principal cannot be made liable in respondeat superior when the actions of his agent in no way constitute negligence. *Devore v. Toledo, Peoria & W. Railroad*, 30 Ill. App.2d 409, 412 (1961); *Haizen v. Yellow Cab Co.*, 41 Ill. App.2d 330, 334, 342 (1963); 32 Chicago-Kent L.R. 145, 148.

The main thrust of plaintiffs' argument is that the conduct and argument of defendants' attorney and the conduct and statements of the trial judge prevented plaintiffs from receiving a fair trial. Rather than misinterpret the context of the remarks which plaintiffs abstracted for our benefit, we took the liberty of reading the entire transcript. On occasion counsel for defendants broke in upon plaintiffs' examination. For the most part the court contained these interruptions and rebuked counsel more than once. The alleged improper conduct of the court appears to amount to no more than an attempt to maintain control over the trial and an effort to keep the presentation of evidence directed toward the propositions to be

established and away from repetitive or prejudicial remarks in the interest of containing the length of the trial to correspond to the complexity of the issues presented.

Considerable latitude must be allowed the court in conducting a trial, and it is only where his conduct or remarks are such as would ordinarily create prejudice in the minds of the jury that they constitute ground for reversal. *Anderson v. Inter-State Accident Ass'n*, 354 Ill. 538, 550 (1933); *Schaffner v. Massey Co.*, 270 Ill. 207, 217-218 (1915); *Reed v. Sands*, 11 Ill. App.2d 355, 357-358 (1956); *Anno: Judge's Remarks-Prejudicial Effect*, 83 ALR 2d 1128, et seq. We do not believe the court disparaged or abused plaintiffs or their witnesses and we consider his efforts to contain the length of the trial and the relevancy of the evidence as praiseworthy rather than oppressive.

On the whole, plaintiffs were allowed great latitude in developing their version of the facts and the jury was fully apprised of the factual issues in the case. Plaintiffs object to the rulings of the court on the admission of testimony, especially those rulings calling for differentiation between ultimate facts and evidentiary facts. We can see no error sufficient to bring these rulings under the gross abuse rule of *Muscarello v. Peterson*, 24 Ill. App.2d 262, 273 (1960) reversed 20 Ill.2d 548 (1960) and *McCray v. Illinois Cent. R. Co.*, 12 Ill. App.2d 425 (1957). The verdict for Harold Dalton was supported by the facts and could not be considered to be against the manifest weight of the evidence.

The direction of verdict for Michigan Express and whether this unduly prejudiced plaintiffs' case is a more difficult question. The answer of Michigan Express denied Harold Dalton owned the vehicle in question, and, by not denying admitted the vehicle was owned by Michigan Express. Harold Dalton later adopted the answer of Michigan

Express as his own. There was no allegation in the complaint that Michigan Express controlled the operation of the truck, but only that the tractor-trailer-truck was maintained and operated by defendant, Harold Dalton.

During the course of the trial plaintiffs called Harold Dalton as an adverse witness under section 60 (Ill. Rev. Stat., ch. 110, § 60). Counsel directed his questions to showing that Harold Dalton, at the time of the accident, was driving in the course of business of Michigan Express when the witness answered several questions in an allegedly unexpected manner. After Dalton's testimony an examination of the pleadings and the testimony of Harold Dalton showed a conflict on the question of ownership. Plaintiffs then sought to introduce a pre-trial discovery deposition for the purpose of impeaching him. The court refused to allow them to do so.

Clearly plaintiffs had the right to introduce testimony from a discovery deposition of an impeaching nature after they have been taken by surprise by a change in testimony. The law was well settled in *Kapraun v. Kapraun*, 12 Ill.2d 348, 355 (1957):

"Obviously plaintiffs were not bound to vouch for the veracity of the testimony of the adverse witnesses and they could have introduced any competent evidence in direct contradiction. (Ill. Rev. Stat. 1957, Chap. 110, par. 60.) However, they were bound by testimony of any adverse witness which stood uncontradicted and unrebutted. *Chance v. Kinsella*, 310 Ill. 515; *In re Estate of Donovan*, 409 Ill. 195."

See also *Bucyna v. Rizzo Bros. Movers, Inc.*, 31 Ill. App.2d 31 (1961).

Plaintiffs contend that the court's arbitrary action in omitting the contradictory statement of Dalton usurped the jury's function and was therefore error. The statements of Harold Dalton fall into two categories: (1) those which pertain to ownership of the vehicle; (2) those which pertain to scope of employment of Dalton.

Harold Dalton's statements concerning ownership were to the effect that he owned the tractor, leased the trailer from George

Griffin and leased the vehicle to Michigan Express under an agreement which was filed with the ICC. The pleadings established that Michigan Express admitted owning the vehicle and that Harold Dalton denied owning the vehicle. The excerpt from the pre-trial discovery deposition reproduced in the record has Harold Dalton stating: "I believe I took over the tractor in March of 1955." This statement is in no way contradictory to or impeaches what Harold Dalton testified to on direct examination. The point of ownership was settled in plaintiffs' favor in the pleadings, but plaintiffs sought to make an issue of it in the trial on their path to establishing scope of employment. Facts which have been admitted in the pleadings are taken as true for the purpose of absolving their proponents from introducing evidence in support thereof. But where the defendant is subsequently quizzed on the same facts constituting the admissions, the correct remedy is to strike these contradictory statements from the record not to introduce prior statements which are consistent with testimony on the stand but inconsistent with the pleadings. The court properly regarded the discovery statement as non-impeaching and implied that if plaintiffs were resurrecting the issue of ownership the contract filed with the ICC would be the best evidence of it.

The question of whether Dalton was an employee of Michigan Express did not arise in the pleadings. Only Dalton was alleged to be in control of the vehicle. After Dalton testified to his leasing arrangement with Michigan Express, plaintiffs attempted to introduce a statement from the discovery deposition to the effect that Dalton was an employee of Michigan Express. The judge refused to allow the statement to be admitted because as he read the deposition the statement regarding the employment of Harold Dalton referred to a period prior to the time of the accident and Dalton had said in the deposition that he owned the truck after March, 1955.

There are two reasons why the court ruled correctly. First, it is the function of the judge and not of the jury to determine whether portions of the deposition sought to be introduced are relevant for the purpose of impeachment. *Bessette v. Loevy*, 11 Ill. App.2d 482, 488-489 (1956). Without the benefit of the entire deposition we must uphold the court's ruling.

Second, if the statement that Dalton was an employee of Michigan Express referred to the period during which the accident occurred, it was not competent. An alleged agent may never attest to his agency and bind a principal by his self-serving statements unless such statements might be admissible under some exception to the hearsay rule not here present. *Merchants' Nat. Bank v. Nichols & Co.*, 223 Ill. 41, 49 (1906); *King v. C.B. & Q. R. Co.*, 235 Ill. App. 401, 407 (1925). Nor can a witness be impeached by incompetent answers. *Kapraun v. Kapraun*, (supra at 355); *Pienta v. Chicago City Ry. Co.*, 284 Ill. 246, 253-256 (1918); *Central Ry. Co. v. Allmon*, 147 Ill. 471, 481 (1893).

Here, again, the court pointed out that the contract filed with the ICC was the best evidence of the relationship of the parties and the plaintiffs should produce it. The first time this document was mentioned by Dalton was on direct testimony on the afternoon of September 20, 1962. It was discussed again on September 21. The court gave the plaintiffs until 9:30 A.M., Monday, September 24 to produce a copy. There is evidence that plaintiffs attempted to get it by summons both to the ICC and to the offices of Michigan Express. It did not arrive during the time set by the court so the case was concluded without it.

The control of the trial is within the sound discretion of the court. The calender is crowded and delays can be costly. Although this contract would have had a bearing on the ownership

and perhaps the agency question, no harm resulted to plaintiffs by the refusal to allow another extension. The court properly ruled on the alleged impeaching statements and the contract could only have had bearing upon the directed verdict for Michigan Express.

The name "Michigan Express" appeared in large bold lettering on the side of Dalton's tractor and trailer. Plaintiffs contend that this alone raised a presumption of operation and control and that therefore a direction of verdict was improper. *Bosco v. Boston Store of Chicago*, 195 Ill. App. 133 (1915); *Robeson v. Greyhound Lines, Inc.*, 257 Ill. App. 278 (1930); *Sutherland v. Guccione*, 8 Ill. App.2d 201, 206 (1955); Anno: Highway Accident-Ownership of Vehicle, 27 ALR 2d 167, 185. This presumption, however, may be rebutted by countervailing evidence. *Bosco v. Boston Store* (supra); 27 ALR 2d 167, 192. Plaintiffs contend the presumption cannot be rebutted so as to allow the direction of a verdict. This is the Pennsylvania rule. *Hartig v. American Ice Co.*, 290 Pa. 21 (1927); *Talarico v. Baker Office Furniture Co.*, 298 Pa. 211 (1929); *Readshaw v. Montgomery*, 313 Pa. 206 (1933). The Pennsylvania rule is not followed in Illinois. 27 ALR 2d 167, 192, 195. The Illinois rule was well stated in *Miller v. Pettengill*, 392 Ill. 117, 123 (1945):

" . . . It is equally well-established law in this State that in the face of evidence a legal presumption ceases to exist and is of no force and effect, and that while standing alone, such presumption might establish a prima facie case, never is a presumption weighed in the balance against evidence to establish a fact. *Lohr v. Barkmann Cartage Co.*, 335 Ill. 335; *Nelson v. Stutz Chicago Factory Branch*, 341 Ill. 387."

In the *Lohr* case (supra at 340-341) it was held that a verdict should be directed over a presumption of agency where no other evidence exists. In this case the uncontradicted testimony of Harold Dalton established that the operation and control of the vehicle was in his hands alone. We believe the presumption was

overcome by this evidence and a verdict was properly directed for Michigan Express.

One last point is that the court erred in giving two instructions. An instruction was given setting out a statute of this State:

"That no vehicle shall, in overtaking and passing another vehicle, be driven to the left side of the roadway under the following conditions:

1. When approaching the crest of a grade on a curve where the driver's view is obstructed;
2. When approaching within one hundred (100) feet of any intersection."

Another instruction stated:

"One of the issues to be decided by you is whether the plaintiffs and the driver of the car in which they were riding were engaged in a joint enterprise. . . .

If you decide that a joint enterprise existed between the plaintiffs and their driver, then you must charge the plaintiffs with the negligence of their driver, if any."

Plaintiffs rely upon Magill v. George, 347 Ill. App. 6, 11 (1952) and Andreas v. Ketcham, 77 Ill. 377, 380-381 (1875) for the proposition that an instruction is improper unless related to proof in the case.

We are hampered in our ability to rule on this point because the conference on instructions was not abstracted. This alone would justify a refusal to consider any error in instructions. Jackson v. Gordon, 37 Ill. App.2d 41, 45 (1962). An examination of the record, however, shows that both of these instructions refer to important elements in this case. The accident occurred on a generally hilly and curvy stretch of highway. Harold Dalton described the particular area where the accident occurred as "sort of curvy and had a bad dip in it." The driver of the car Nick Spiropoulos testified he waited behind defendants' truck because of curves until a straight stretch appeared.

As to the second instruction, the Great American Indemnity Co. was allowed to intervene as subrogee of the plaintiffs because it

was liable for Workmen's Compensation liability on the K & S Foods, Inc., a corporation run by plaintiffs. The petition filed on November 6, 1957, further alleged that on the day of the occurrence the plaintiffs were in the course of their employment for the K & S Foods, Inc., and the occurrence referred to in the complaint arose out of their employment by the corporation. The petition was later amended on September 21, 1962, to read that Constantine Closterides alone was in the course of his employment for the K & S Foods, Inc. on the day of the occurrence. The plaintiffs were questioned regarding the reason for their trip to Rockford throughout the trial. We believe these two instructions were properly given based on elements and testimony in the case.

The verdict and order should be affirmed in this case. The court properly directed the course of the trial and there are no errors of sufficient magnitude to warrant granting a new trial.

JUDGMENT AFFIRMED.

BURKE, P.J., and FRIEND, J., concur.



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PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff ~~in Error~~ ^{-Appellee}
v.
WOODROW TEMPLE,
Defendant ~~in Error~~ ^{Appellant}

~~WRIT OF ERROR TO~~
MUNICIPAL COURT
OF CHICAGO

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

An information filed in the Municipal Court of Chicago on March 12, 1962, charged that Woodrow Temple on February 10, 1962, committed the offense of theft of an electric shaver, a car coat and two jackets, the property of Harvey Levin, intending to deprive him of the personal use and benefit thereof, in violation of Chap. 38, § 16.1a, Ill. Rev. Stat. 1961. On June 6, 1962, in a trial without a jury, the court found the defendant guilty in manner and form as charged in the information and entered judgment that he be sentenced to confinement in the County Jail of Cook County for four months (considered as having been served.) The defendant who is now imprisoned at Menard Penitentiary under a parole violation in a previous sentence has sued out a writ of error to review the record of his conviction for theft. He has been allowed to prosecute the writ of error as an indigent person.

The theory for reversal of the judgment urged by the defendant is as follows:

"Notwithstanding that the plaintiff, was tried and convicted upon a misdemeanor and his sentence was considered served, because of the fact that he had spent more than Four Terms of Court awaiting trial, he has an absolute right to contest his conviction. (See Historical Notes to Chap. 110, S.H.A.)

"This petitioner was arrested without warrant and without probable cause on the 12th day of February, 1962, searched and confined in jail, because one Truman Jackson told the police that the forged check he was arrested for attempting to pass had been given to him by the petitioner.

"Upon no more evidence than this, the police jailed the petitioner and after Four Terms of Court, finally brought

him to trial. The petitioner denied these charges and explained to the Court that he was a prisoner on parole from the ILLINOIS STATE PENITENTIARY, and because Jackson had the knowledge of that fact was the obvious reason that he had sought to shift the weight of guilt from his own shoulders to those of the petitioner.

"There were no other witnesses in Court. Truman Jackson, upon whose unsupported and uncorroborated word, Petitioner was arrested, was not present. Neither was Ruthie Mitchell, a codefendant, caught aiding and abetting Jackson. Although both had been granted a years probation in prior proceedings.

"A check writing machine, produced in evidence, was testified NOT to have been found in the petitioner's home, but in the home of one "James Smith," who had also been previously discharged. There was no evidence that said machine was under petitioner's exclusive control or in his possession, or that it ever had been in his possession, or under his exclusive control.

"Petitioner submits that the above facts amount to hearsay and guilt by implication. There was no other evidence before the Court upon which to adjudge him guilty.

"The Court erred in making a finding of guilty and said finding of guilty was an expediency to avoid the implications annexed to an imprisonment of Four Months duration without prosecution.

"That this finding of guilty automatically made the prisoner a parole violator and has grievously injured him by causing him to be returned to the Penitentiary even though he was innocent.

"WHEREFORE, the petitioner prays that the writ of error issue and that this Court will review said Trial Record and set aside and reverse the judgment of the Municipal Court of the City of Chicago and this petitioner be discharged from his unlawful Sentence."

The defendant feels that should his conviction in the Municipal Court be reversed that the Parole Board would reconsider his case and release him on parole in the case in which he is now serving a sentence. The first point that the defendant presents is that he was not tried within four terms of court. Chap. 38, § 748, Ill. Rev. Stat. 1961 provides that any person committed for a criminal or supposed criminal offense, and not admitted to bail, and not tried by the court having jurisdiction of the offense, within four months of the date of committment, shall be set at liberty by

the court, unless the delay shall happen upon the application of the prisoner. The record in this case shows that the information was filed on March 12, 1962, and that the case was postponed for trial until March 23, 1962. On March 23, 1962, on motion of defendant the case was postponed until April 13, 1962. On the latter date the case was again postponed, on motion of defendant, until April 24, 1962. On April 24, 1962, the court postponed the trial until June 6, 1962. On the latter date the defendant was arraigned, pleaded not guilty, waived a trial by jury, was tried by the court, found guilty and sentenced. From a recitation of the record it appears that two of the postponements were at the request of the defendant. He was tried within four months of the postponement requested by him on April 13, 1962. It is well established that where the failure to try the defendant within the prescribed time was occasioned by the defendant himself, that the above mentioned statute does not apply. Apparently the defendant recognized this when he was in the trial court because he did not make any motion for a discharge on the ground that he was not brought to trial earlier. The defendant's first point is without merit.

The other points urged by the defendant relate to the facts of his arrest and the evidence presented in the trial. We are not aided by a bill of exceptions or a report of proceedings. We do not know what testimony was presented as to the arrest or guilt of defendant. In the absence of a bill of exceptions or report of proceedings we assume that the court acted in accordance with the law of the land and the evidence presented. We are required to assume that the evidence supports the judgment. Rule 65 of the Rules of the Supreme Court provides "that in all criminal cases in which review is sought by writ of error or notice of appeal the bill of exceptions or report of proceedings at the trial, if it is to be

incorporated in the record on review, and other proceedings which the party seeking review decides to incorporate in the record on review, shall be submitted by the party seeking the review to the trial judge or his successor for his certification of correctness and be filed in the trial court within 100 days after judgment was entered, or within any extension thereof granted within the 100 days or any extensions thereof." The application for the writ of error was not made or presented until October 1963. The rule quoted was in effect in June 1962, when the defendant was convicted in the Municipal Court and in October 1963, when he applied for the writ of error. Rule 27 of the new Rules of Procedure in criminal appeals effective January 1, 1964, requires that appeals shall be perfected within 30 days from the entry of judgment and that the trial judge shall cause the report of proceedings to be certified by the reporter and filed with the trial court within 50 days after the filing of the notice of appeal, and that if the reporter is unable to complete the report within the time prescribed the judge shall fix the time for certification and filing. The defendant did not make any attempt to procure a report of proceedings or a bill of exceptions under either the old rule or the new rule.

The defendant has not established any ground for reversal. Therefore the judgment is affirmed.

JUDGMENT AFFIRMED.

FRIEND, J., and BRYANT, J., concur.

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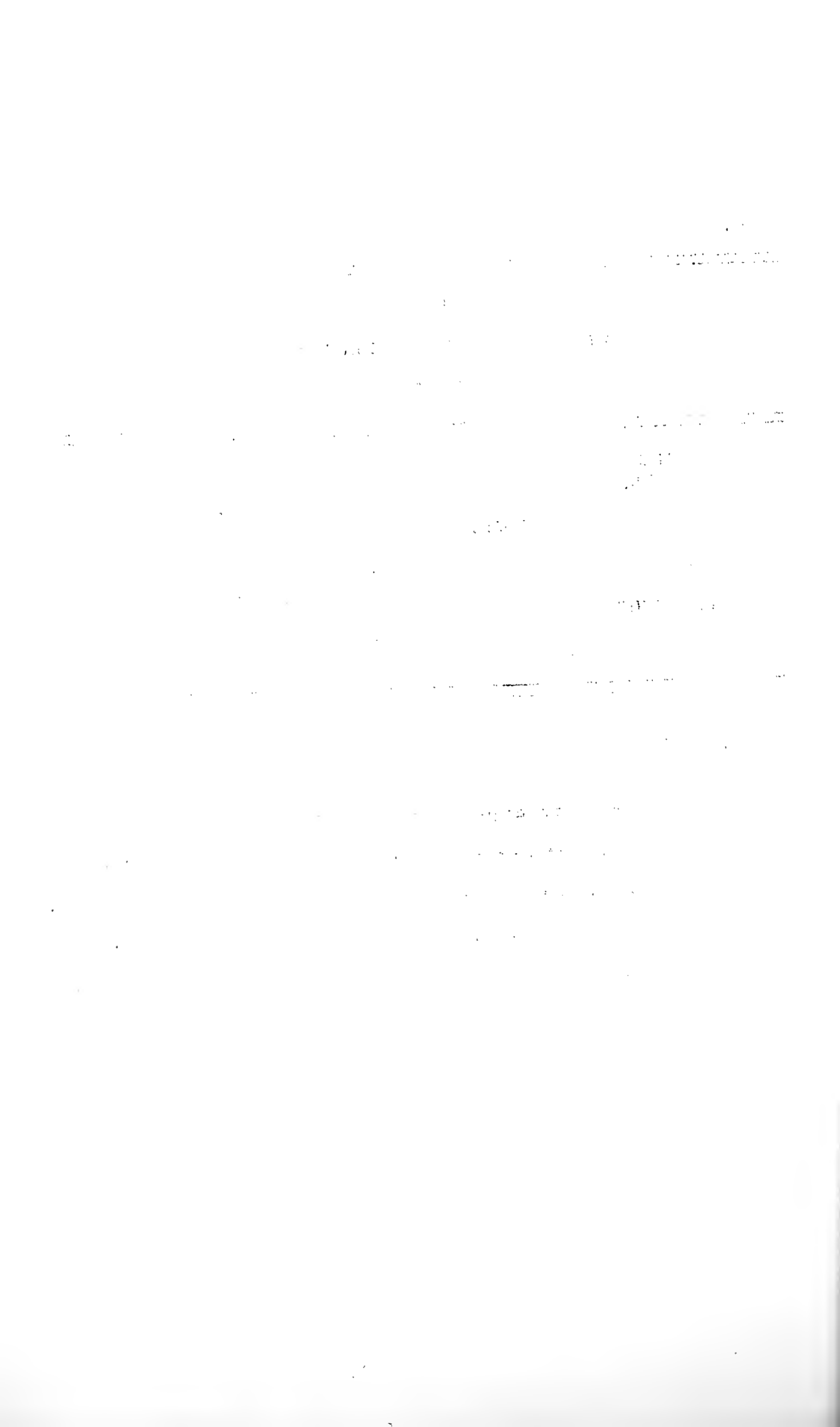
Agenda No. 26

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

JASPER INGRANDE and	:	
SARAH INGRANDE,	:	
	:	Appeal from the
Plaintiffs-Appellees,	:	
	:	City Court of
vs.	:	
	:	Alton, Illinois
ROBERT L. HIGGINS,	:	
	:	
Defendant-Appellant.	:	

DOVE, P. J.

This is an appeal by the defendant from a judgment rendered against him by the City Court of Alton, Illinois, in favor of the plaintiffs, for \$1022.00. The complaint consisted of two counts. Count one alleged, among other things, that the defendant represented to the plaintiffs, who are husband and wife, that a dwelling house, which he induced them to buy, was a Gold Medallion Home, and was insulated and wired in accordance with the Union Electric Gold Medallion Home Program, and that the cost to them of the electricity used in operating said home would not exceed \$35.00 per



month. It was averred that these representations were false and untrue, and so known to be, by the defendant, at the time he made them.

Count two of the complaint alleged that on or about June 10, 1960, the defendant, for a valuable consideration, entered into a contract in writing, with plaintiffs by which it was agreed that defendant would sell, and plaintiffs would purchase, a Gold Medallion Home, which was owned by defendant and located at 221 Westwind Drive, Alton, Illinois, for \$25,800.00; that said home would meet said specifications and would include storm windows and doors; that plaintiffs have performed all the conditions of said agreement on their part to be performed; that defendant has failed and neglected to perform said agreement in that he failed and refused to supply storm windows and doors for said home, and said home does not meet the specifications for a Gold Medallion Home. An affidavit of the plaintiffs recited that their copy of the written contract referred to in this count as having been executed by the parties on June 10, 1960, cannot be located; that they have made diligent search for the same and diligent inquiry among all persons who might know where it is, but have been unable to find the same, and that no copies thereof, either signed or unsigned, are accessible to either plaintiff.

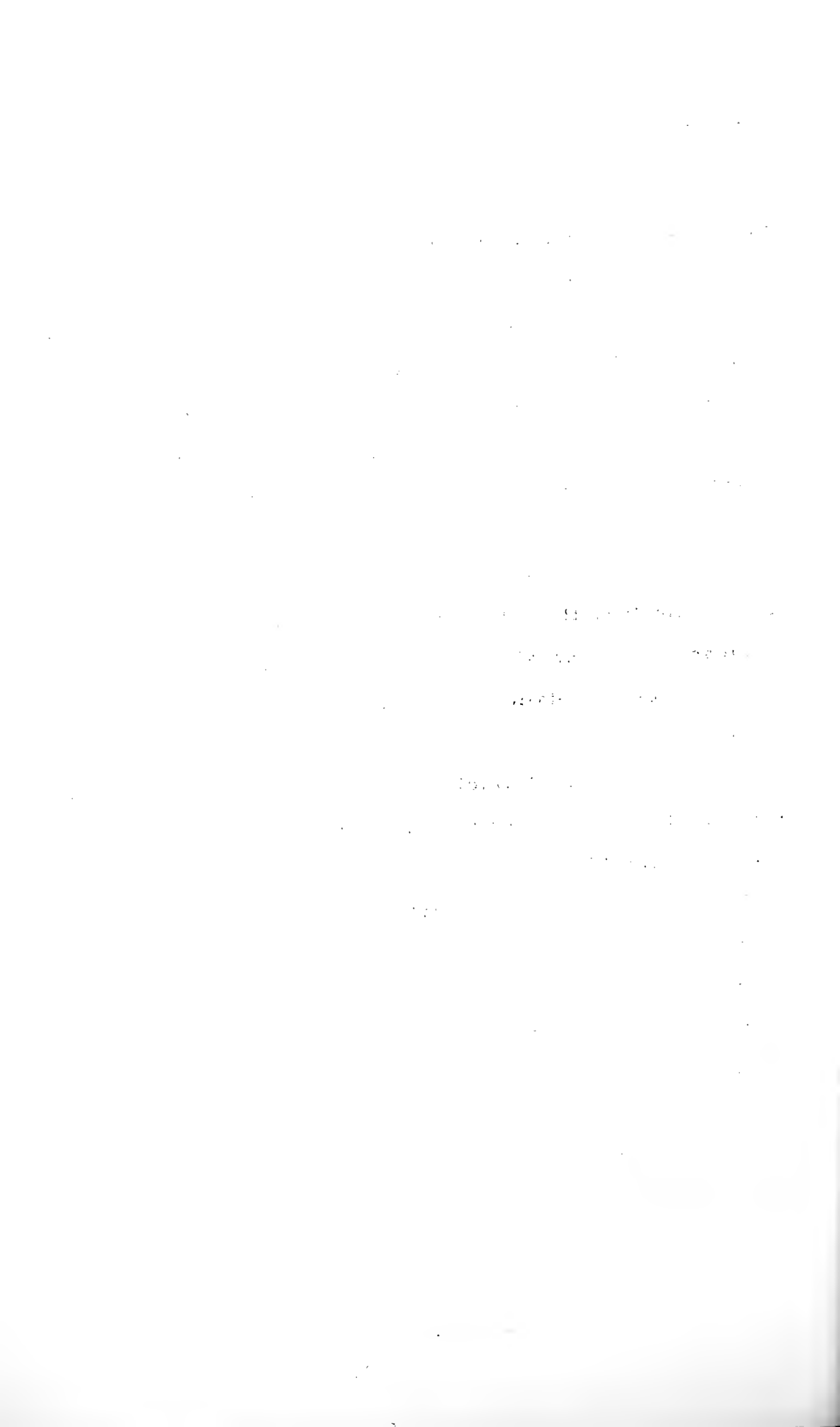
The answer of the defendant as to count one admitted that the home referred to was not a Gold Medallion Home, and avers that it was never represented to be such. The defendant denied making any false statements as charged, and denied substantially all the other allegations of this count. In his answer to count two, defendant admitted entering into a contract with the plaintiffs as alleged, but denies that the contract represented the home to be a Gold Medallion Home, and built according to plans and specifications published by Union Electric Company. The answer also admitted that plaintiffs promised and agreed to purchase the property for \$25,800.00, and admitted that the plaintiffs have performed all the conditions of the contract, on their part to be performed. The defendant denied the other allegations of this count.

The issues made by the pleadings were heard by the court without a jury, resulting in a finding that the allegations of fraud, as alleged in count one, were not proven, and upon that count the court entered judgment for the defendant. As to count two, the court found the issues for the plaintiffs, and rendered judgment in their favor for \$1022.00. As no cross-appeal has been filed, the only question presented by this record is whether the judgment of the trial court upon the issues made by count two and

defendant's answer thereto are supported by a preponderance of the evidence.

The issues presented to the court for determination by the pleadings are, (1) did the contract specify the sale by defendant and the purchase by the plaintiffs of a Gold Medallion Home?, (2) did the contract specify the installation of storm windows in the home purchased?, and (3) did the contract specify the installation of storm doors in this home? If any of these questions are answered in the affirmative, then the court must determine whether any of these provisions of the contract were breached, and if so, the amount of damages plaintiffs sustained by reason thereof.

The record discloses that the Union Electric Company has two types of homes under its so-called "Medallion" program. The "Gold Medallion Home" is one which conforms to the Union Electric Company's specifications with regard to electric insulation, wiring, heating and lighting. The "Medallion Home" is one which conforms to Union Electric's specifications with regard to lighting and wiring only. The defendant is a building contractor, and was interested in developing a residential subdivision in Alton, and the house he built and sold to plaintiffs was a Medallion Home, but not a Gold Medallion Home.



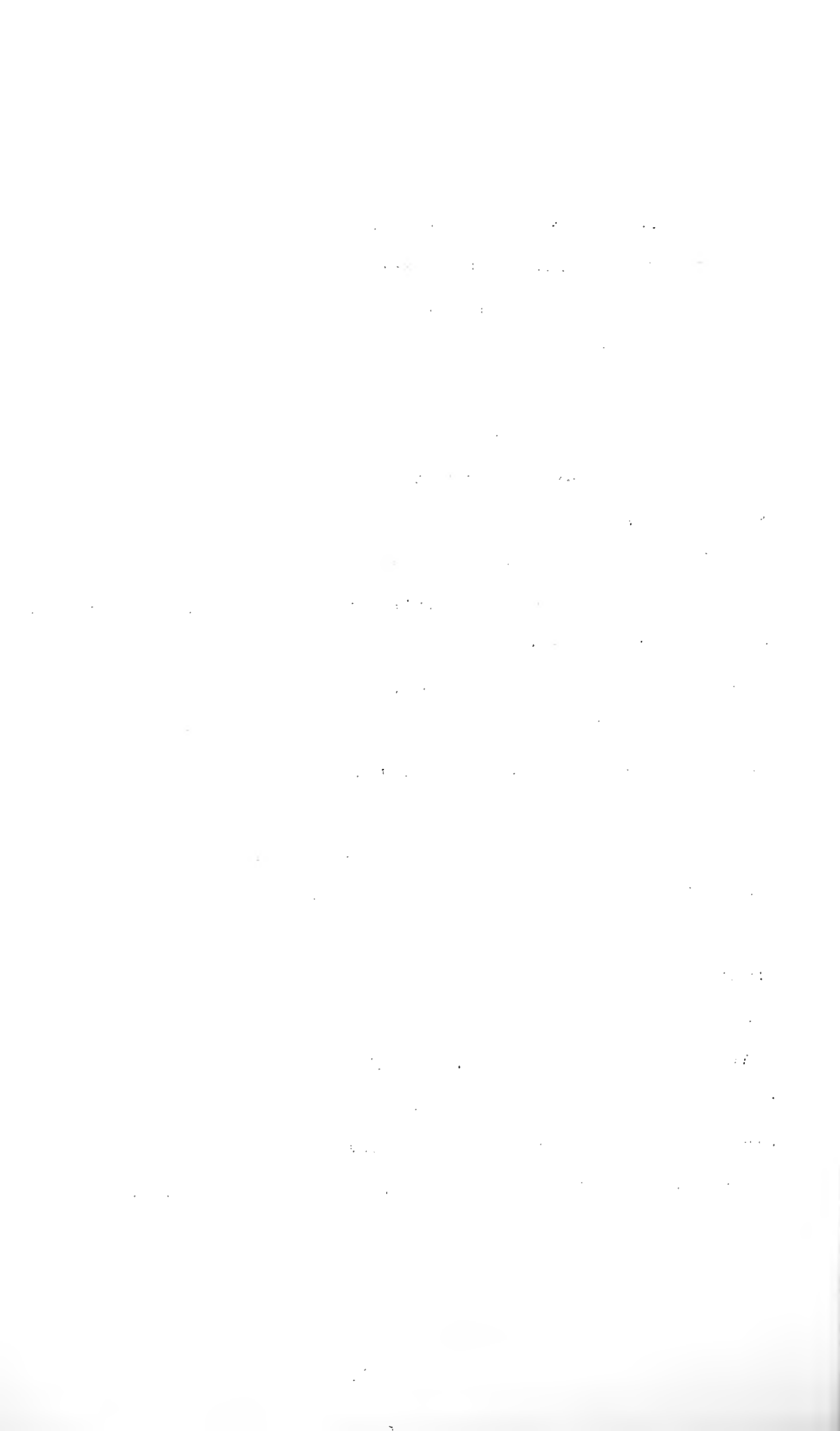
Jasper Ingrande, one of the plaintiffs, testified that he was born in Sicily, and came to America in 1940, and could neither read nor write English; that he and his wife contacted John Jay Dick, a real estate broker living in Alton, who had entered into a Listing Agreement with defendant, on March 15, 1960, by the provisions of which the Dick Realty Company was given the exclusive right to sell this property. The reverse side of this contract, or listing agreement, which was offered and admitted in evidence, states that the type of furnace in this house is "Gold Medallion Electric", and that the home is a "Gold Medallion" home. Mr. Ingrande further testified that he and his wife bought this property through Mr. Dick, because his wife liked it, and wanted it, and that Dick told him and his wife that it was a Gold Medallion Home.

John Jay Dick was called as a witness by the plaintiffs, and testified that at the time he and defendant executed the Listing Agreement the house was under roof, but only about one-third completed; that when the agreement was executed, he talked with defendant about the specifications, and what the house would look like, and defendant told him he planned to build a Gold Medallion Home; that he would put on storm doors and windows and meet the Gold Medallion requirements of Union Electric Company; that

he advertised the house for sale as a Gold Medallion Home in the Alton Evening Telegraph; that during the time it was being constructed, there was a plaque in the window indicating that the construction was to be a Gold Medallion Home.

This witness further testified that when plaintiffs purchased this home, a written contract, of which there were two copies, was executed by plaintiffs and defendant, and that these were taken to the Piasa First Federal, which financed the deal for the plaintiffs; that he has made inquiry at Piasa First Federal, and searched his office, but has been unable to locate this contract.

Alfred J. Norcorn was called as a witness by the plaintiffs, and he testified that he represents the Union Electric Company, and had been with that company for more than twenty-five years; that he was familiar with Gold Medallion homes, and the Gold Medallion program conducted by Union Electric; that a Gold Medallion home must meet certain lighting, wiring and insulation requirements, and all windows must be storm windowed and all doors require storm doors; that he is familiar with the dwelling which is the basis of this litigation, and that in the winter or spring of 1960 defendant talked to him about qualifying this house in the Gold Medallion program, but was told by the witness it could not



be so qualified, because the defendant only owned eight lots in this sub-division and a minimum of ten lots was required.

Sarah Ingrande testified that she visited the home three times before they purchased it; that she and her husband and defendant executed a written contract of purchase, which has been lost or misplaced, and she was unable to produce it; that she recalled the terms of the contract and it provided that the home was a Gold Medallion home with electric heating and storm doors and windows; that there was an emblem in the window stating it was a Gold Medallion home; that before the contract was executed, she saw this emblem in the window, inquired of defendant whether the house was a Gold Medallion home, and defendant said it was; that she moved into the house in June, 1960, and in the following winter defendant put in, at plaintiff's repeated request, two storm doors.

The defendant testified that he was a general contractor, and had been in the construction business for ten years; that he entered into a contract with plaintiffs for the sale and purchase of this home, but did not recall whether it was a written contract, but he thought it was, although he did not remember signing it. This witness admitted that Mr. Dick asked him whether the house was a Gold Medallion home, but testified that he did not recall

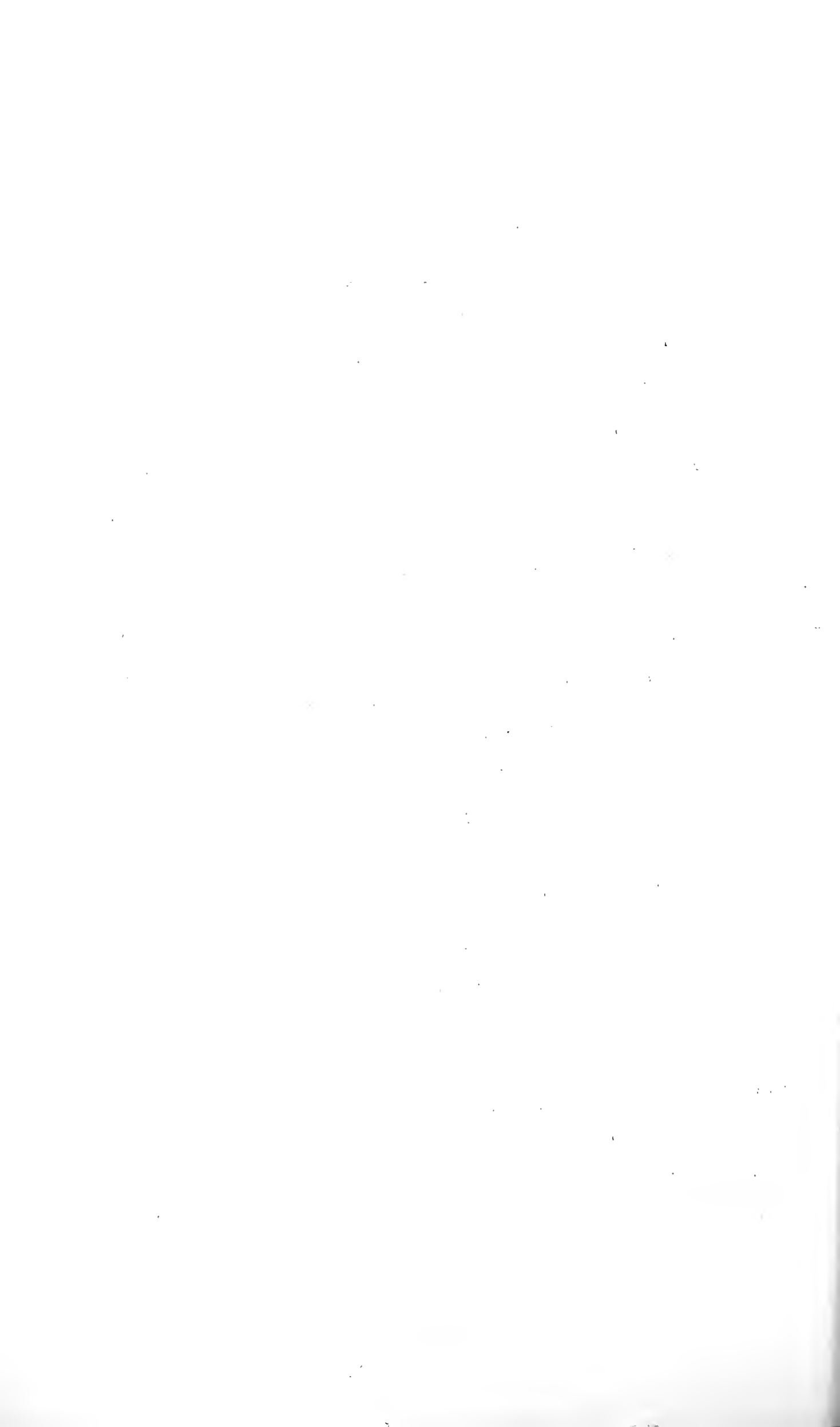


whether this question was asked before or after Dick had advertised it in the papers as such, and he, the defendant, said that he told Dick it was not a Gold Medallion home. He further testified that Mr. Norcorn, of Union Electric, contacted him after the advertisement appeared which stated this home was a Gold Medallion home, and he, Norcorn, told defendant to stop Dick advertising it as such. Defendant said thereafter he did contact Dick and told him not to advertise the home as a Gold Medallion home, but he did not recall whether Dick did, or did not, continue to so advertise it. With reference to the plaque, defendant testified that it was not in the window of the house, during construction, but in the front yard, and as he recalls, the word "Medallion" was not on the plaque, but he could "not say for sure that Gold Medallion was not on the sign." Defendant further testified that he had not been able to locate any copy of the contract and that "to my knowledge, I did not sign a contract for the sale of this house to the Ingrandes, on which contract it was indicated this was a Gold Medallion home." He further testified that he did not have any agreement with them about furnishing storm doors or storm windows for the house.

From the pleadings and the evidence, of which the foregoing is a fair resume, the trial court determined that the contract executed by the parties specified that the

home which plaintiffs contracted to purchase was a Gold Medallion home; that the contract specified the installation of storm windows and storm doors, determined that defendant breached the same, and fixed the amount of plaintiff's damages at \$1022.00.

The testimony of Mrs. Ingrande indicates that after the plaintiffs moved into their new home, defendant, at her repeated requests, caused to be installed the storm doors and paid for them, but refused to comply with her demand that he install storm windows. Mr. Ingrande testified that he had the storm windows installed, and he paid Darrel C. Hileman therefor, the sum of \$300.00, and a receipted bill for that amount was offered and admitted in evidence without objection, and identified as plaintiff's exhibit No. 4. Mr. Ingrande further testified that he had the required insulation installed and paid \$615.00 therefor to Gersman and Company, and a receipted bill of that company was also offered and admitted in evidence as plaintiff's exhibit No. 5. These amounts aggregate \$915.00. The trial court found, according to the brief of counsel for appellees, that during the year prior to the time the storm windows and insulation were installed, the electric bills paid by the plaintiffs were \$107.00 higher than the year immediately following, and the court awarded that sum to the plaintiffs



in addition to the \$915.00, or a total of \$1022.00, the amount of the judgment.

In order to qualify this house as a Gold Medallion home, the record shows the expenditure by plaintiffs of \$915.00, and under the pleadings and evidence, the court might properly award plaintiffs that amount as damages, but the further sum of \$107.00 is too speculative and conjectural to be considered as damages, and, under the pleadings, should not have been included in the award made to the plaintiffs.

The written contract which forms the basis of this action was not produced at the trial. What its provisions were and whether any of them had been breached were questions of fact to be determined in the first instance by the trial court. The defendant by his answer admitted that a written contract was entered into, and that he sold, and that the plaintiffs purchased, the premises referred to in the pleadings for \$25,800.00, and that plaintiffs paid that sum for the premises and carried out the contract as they were obligated to do.

The trial court heard this case without a jury. The court observed the witnesses and was best able to judge of their credibility. The court adopted plaintiff's theory and where the evidence is conflicting, the findings

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of the trial court will not be disturbed by a reviewing court, unless those findings are clearly against the preponderance of the evidence or unless it is apparent that an error has been committed. (Arliskas v. Arliskas, 343 Ill. 112; Calcutt v. Gaylord, 415 Ill. 390).

If the plaintiffs shall file, within thirty days after this opinion is filed, a remittitur of \$107.00, the judgment of the trial court will be affirmed for \$915.00. If such a remittitur is not so filed, then the judgment appealed from will be reversed and this cause remanded to the Circuit Court of the Third Judicial Circuit for a new trial. Each party to pay one-half of the costs in this court.

Affirmed on Remittitur.

Wright, J., concurs.

Reynolds, J., concurs.

Publish abstract only.

FILED
JUN 2 1964
James P. McLaughlin
CLERK OF THE APPELLATE COURT
FIFTH DISTRICT OF ILLINOIS

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AGENDA NO. 24.

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT.

ELIZABETH TARASUIK, Administrator)	
of the Estate of Wassell Tarasuik,	)	Appeal from
a/k/a Wassell Tarasuik, Deceased,	)	the Circuit
	)	Court of
Plaintiff-Appellee,	)	Madison County
)	
vs.)	
)	
JOHN RUSSELL and VICTOR RUSSELL,)	
Defendant-Appellant,)	
VICTOR RUSSELL,)	
Counterplaintiff-Appellant,)	
)	
vs.)	
)	
ELIZABETH TARASUIK, Administrator)	
of the Estate of Wassell Tarasuik,	)	Hon.
a/k/a Wassell Tarasuik, Deceased,	)	Richard R. Clark,
	)	Trial Judge.
Counterdefendant-Appellee.)	

REYNOLDS, J.

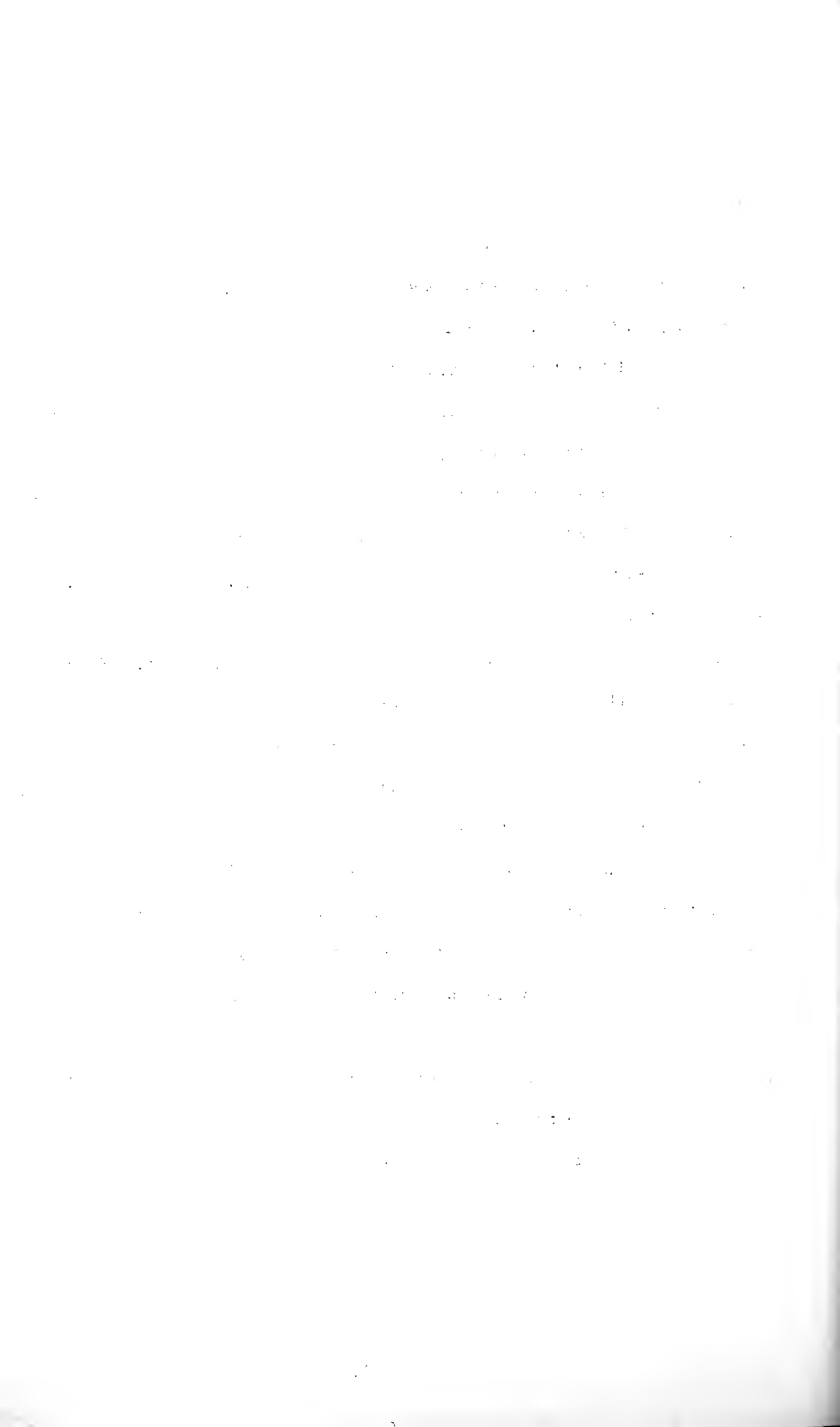
This cause arose from a two car collision on Illinois Route No. 140, approximately two miles east of Alhambra, Illinois. The highway at the point of collision is straight and level, with a slight rise to the east, is black-top with divider of intermittent white line, and is

two laned. At the point of impact, the area is rural with speed limit of 65 miles per hour. There were some patches of fog, but the pavement was dry. The accident occurred at dawn, 4:30 a.m. June 18, 1961.

Plaintiff's intestate, Wassell Tarasuik, was headed west and defendant Victor Russell was headed east. The two vehicles collided, left front to left front, and after impact the two vehicles apparently swung in a counter-clockwise direction so that the Russell automobile ended approximately in the middle of the highway, facing generally northwest, and the Tarasuik automobile ended just off the pavement to the north and facing southeast. Debris and oil on the highway from the wrecked automobiles was on the north side of the west-bound or Tarasuik's lane. Tarasuik was killed in the collision, dying almost instantly. Russell was seriously injured.

There were no eyewitnesses to the accident other than Victor Russell who was not a competent witness by reason of the Dead Man's Act. The only witnesses to testify were post-occurrence witnesses including a deputy coroner, a tow car driver, two Illinois State Policemen, a passerby, witnesses as to the driving habits of both drivers and damage witnesses.

Tarasuik was a 38 year old construction worker

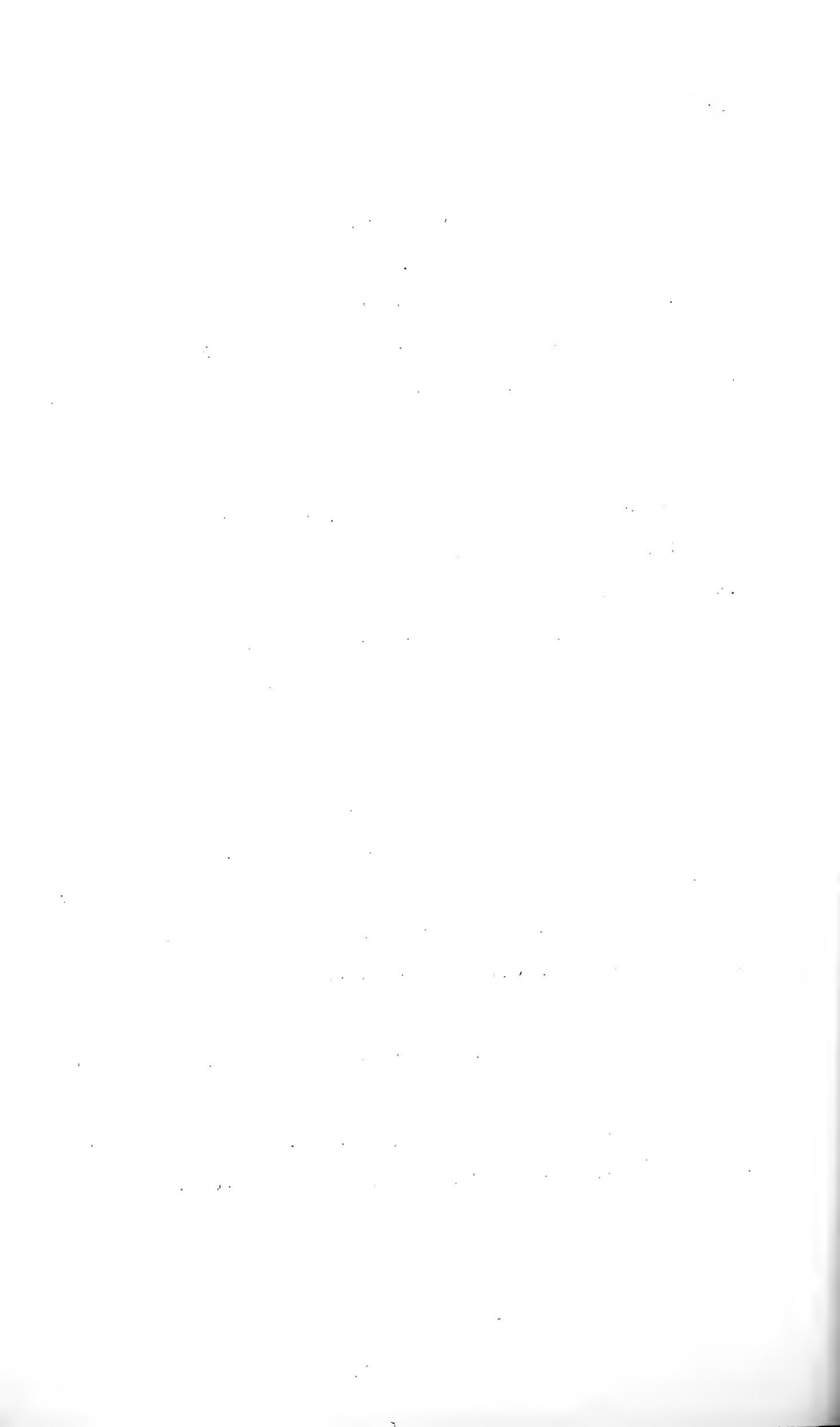


and left a widow and two minor children. Russell was a 21 year old college student. Tarasuik had gotten up early, made his own breakfast and left to go fishing. Russell had been visiting a girl friend in the Wood River area the evening before the accident and was on his way home near Effingham.

Plaintiff as administratrix of the Estate of Wassell Tarasuik, brought suit against Victor Russell and Russell filed his counter-claim against her, as administratrix. The cause was tried before a jury and the jury returned a verdict finding for the plaintiff in the sum of \$25,000.00 and against Russell on his counter-claim. Defendant Russell appeals to this court.

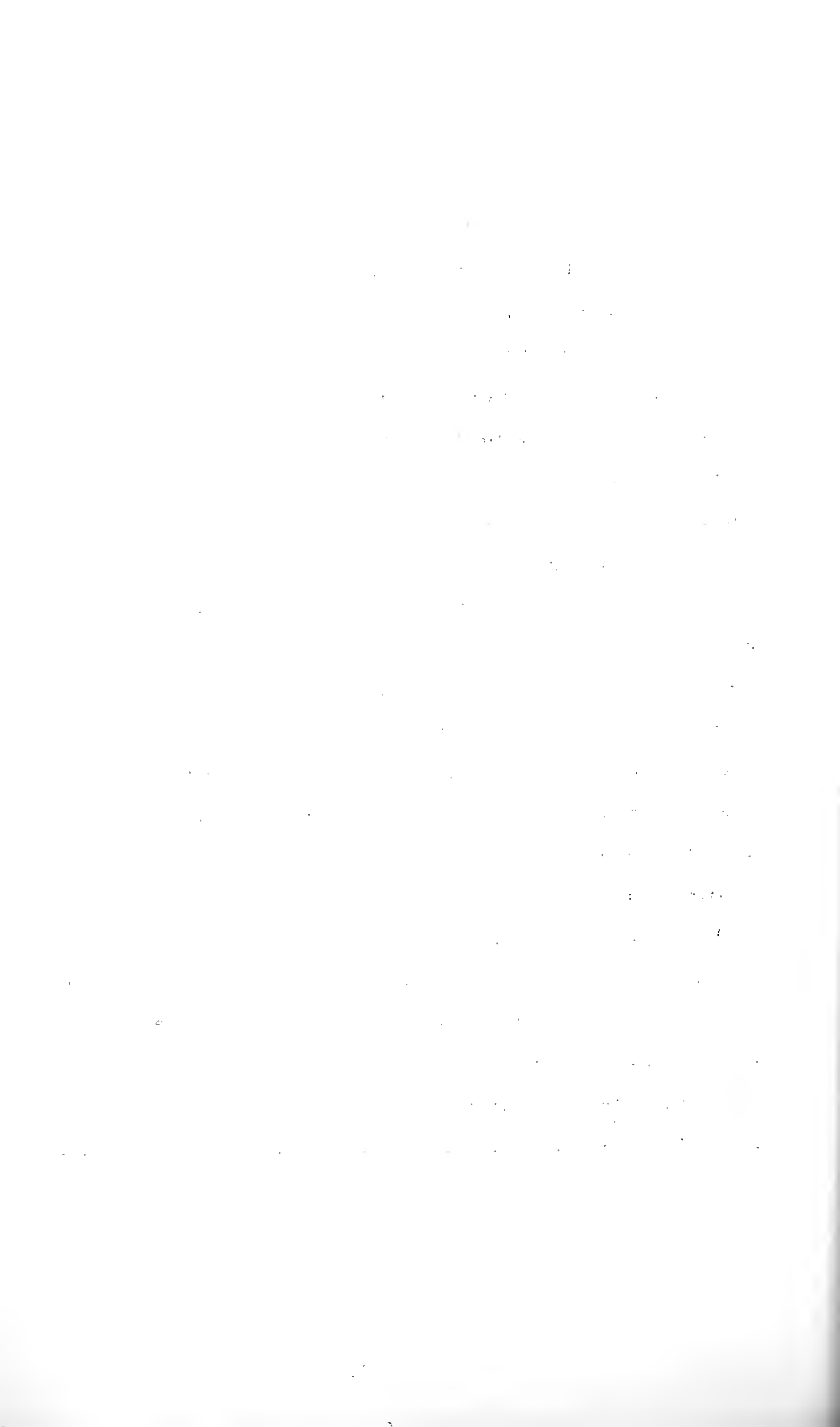
The points raised by defendant on appeal are numerous and to attempt to discuss each point at any length would serve no useful purpose. Instead the main points raised by the defendant will be discussed, in four categories, namely, (1) Admission of improper evidence, (2) Exclusion of proper evidence, (3) Failure to strike testimony of driving habits and due care of the decedent, (4) Misconduct of plaintiff's counsel in closing argument to the jury.

On the question of the admission of improper evidence, defendant claims the court permitted leading

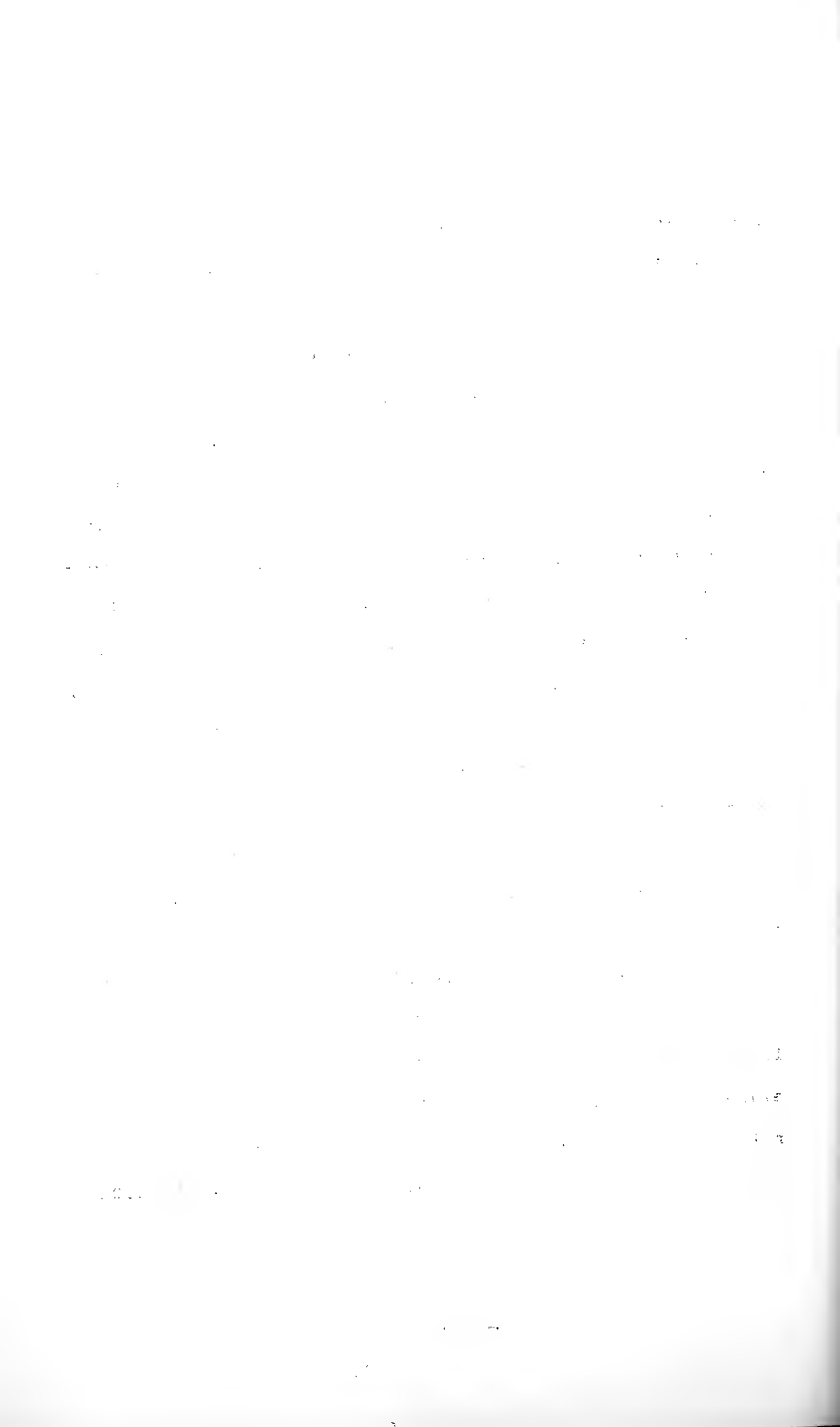


questions, cross-examination on matters not covered by direct examination and that improper demonstrative evidence was admitted.

In argument, the defendant claims error in the admission of the answer of deputy coroner Dauderman, as to the location of a mark on the pavement with relation to the north edge of the pavement of the highway. As to the improper cross examination, defendant claimed the court permitted plaintiff's counsel to ask defense witness Sprankle questions about oil spots on the highway, gouge marks on the pavement and that he had heard the gouge marks being made when the Russell car was moved, and that these matters had not been covered in direct examination and that defendant had no opportunity to cross-examine or impeach the witness on the new evidence developed by these questions. As to the third matter, admission of improper evidence relates to the admission of a road map of Illinois as evidence in the cause. Defendant argues that the only purpose of admission of this road map would be to show the distance between Wood River where the defendant had been visiting his girl friend, and his home at Effingham, thus inferring excessive speed on the part of the defendant. The area shown by the road map which was



a cut-out part of an Illinois highway map, showing an area of Illinois from St. Louis and the Wood River area eastward to a short distance east of Effingham. A consideration of these three claimed errors on the part of the trial court fails to disclose any reversible error. The witness Dauderman had testified in both direct and cross examination as to tire marks on the pavement. He was finally asked to locate the tire mark and was allowed to testify as to his recollection of the mark. The questioning of Sprankle as to oil spots, and gouge marks on the pavement, may not have been specifically covered in the direct examination of this witness, but since the witness had testified as to the position of the cars, the mark on the pavement, and such other pertinent facts about the scene of the accident, it would seem that any questions as to marks on the pavement, or debris and oil on the pavement would be not only proper but necessary. As to the road map, it is difficult to perceive how the introduction of the map would prejudice the case for the defendant. All of these claimed errors seem to be those little differences of opinion and questions of law that arise in every lawsuit. The admission of evidence or the refusal to admit certain evidence is largely a matter of sound discretion on the part of the trial court. Peebles

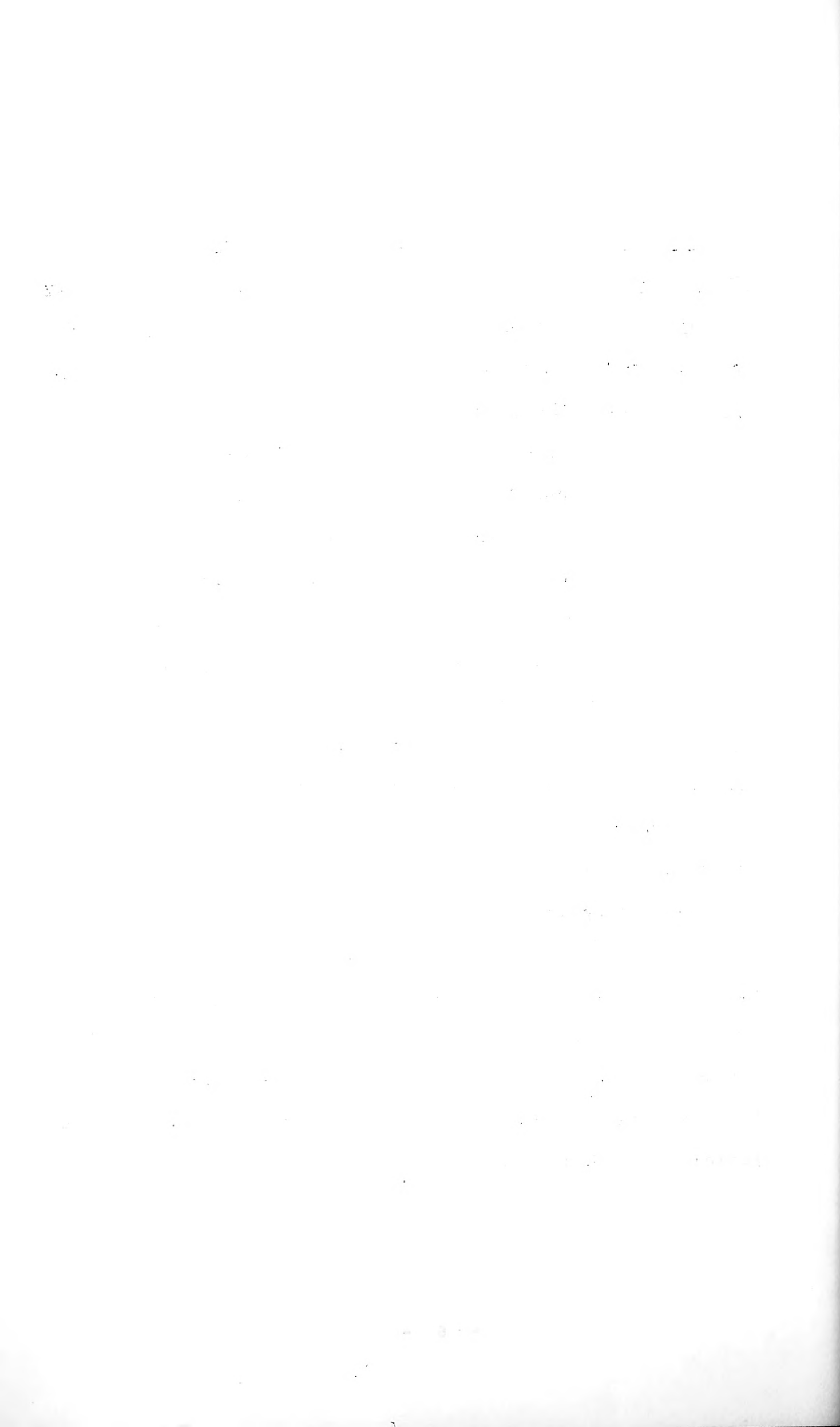


v. O'Gara Coal Co., 239 Ill. 370 ; Hatcher v. Quincy Horse Ry. & Carrying Co., 193 Ill. App. 590; Daugherty v. Heckard, 189 Ill. 239. In the Daugherty v. Heckard case, cited with approval by the court in the Peebles v. O'Gara case, the court said:-

"The propriety of admitting or excluding leading questions is within the sound discretion of the trial court. In some of the States this discretion is not subject to review; in others the rule is that a manifest and injurious abuse of the discretion may be corrected in the courts having appellate jurisdiction. The latter rule obtains in this court."

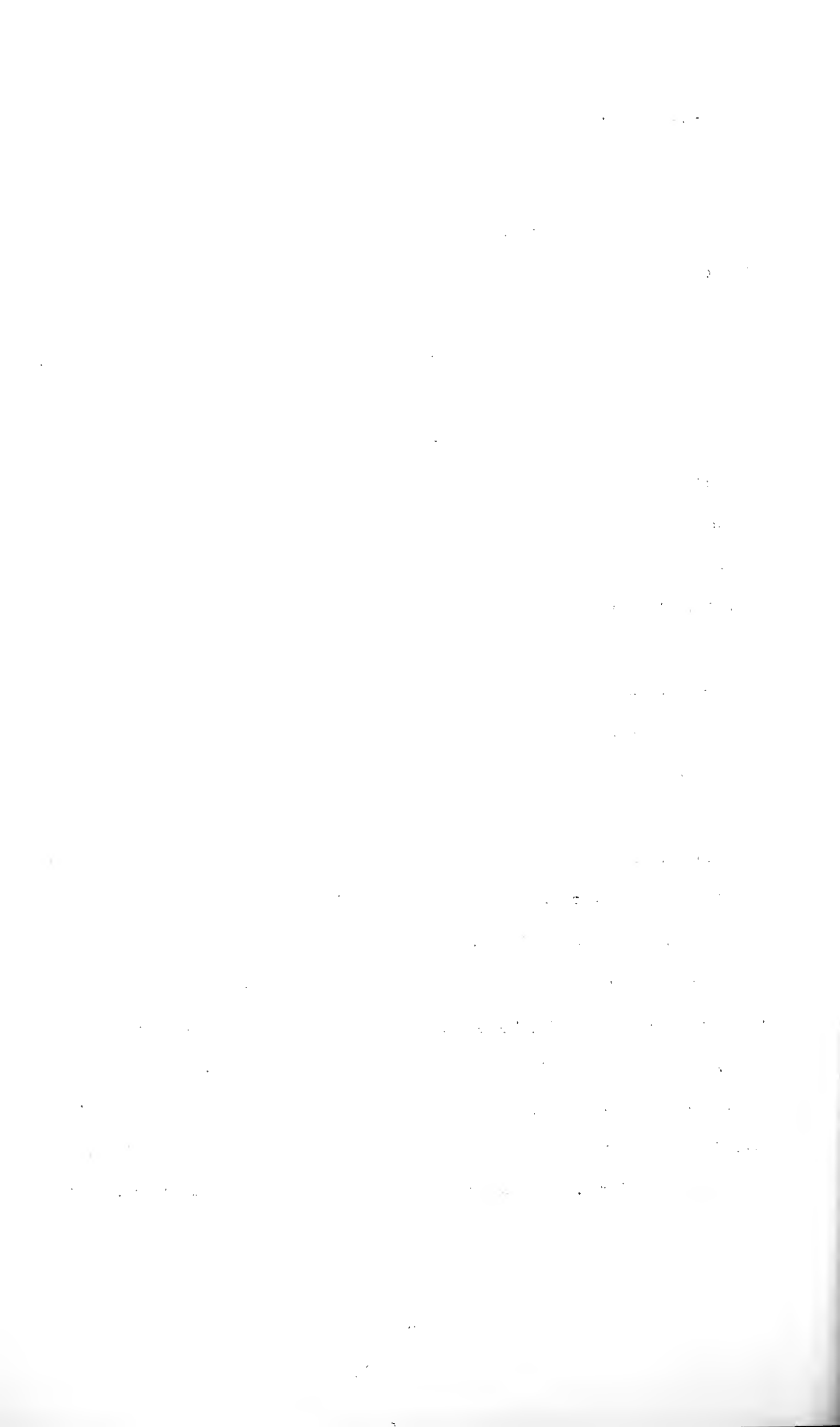
In the case of Funk v. Babbitt, 156 Ill. 408, the rule was laid down that the allowance of leading questions would only be ground for reversal when the discretion of the trial court was palpably abused and substantial injury done.

This court has considered the matters raised by defendant on the question of admission of improper evidence and finds that under the rules as stated above, these questions and evidence were within the bounds of the discretion vested in the trial court and were not prejudicial to the defendant.



The second point urged by defendant is that the trial court refused testimony that would have impeached the testimony of Officer Sprankle, a supposedly friendly witness for the defendant who had suddenly turned hostile. The defendant contends he was entitled to claim surprise and had the right to cross-examine this witness and ask leading questions. The defendant further contends that under the circumstances the trial court should have called Officer Sprankle as a court witness and permitted the defendant to cross examine.

There was testimony that the attorneys for the defendant had talked to Officer Sprankle a day or so prior to the trial and that his testimony on the stand was not materially different from what he discussed with the attorneys. If his testimony on this point is true, there was no surprise and when the defendant called Officer Sprankle to the witness chair, he knew or should have known what the witness would testify. Under such circumstances defendant had no right to cross examine or impeach. In the case of McCray v. Ill. Cent. R. Co., 12 Ill. App. 2d 425, the trial court permitted the witness to be impeached and contradicted by use of an alleged prior inconsistent written statement. And the court said in that case that as a general rule, a party voluntarily calling a witness to



the stand vouches for his credibility and cannot impeach him except as that result may be incidentally accomplished by proving a state of facts differing from that sworn to by the witness. Citing People v. Michaels, 335 Ill. 590 and Chicago City Ry. Co. v. Gregory, 221 Ill. 591. If a party's witness unexpectedly gives surprising testimony at variance with an earlier statement, the party calling the witness has the right to call the attention of the witness to such statement for the purpose of refreshing his memory or awakening his conscience. Finch Bros. v. Betz, 134 Ill. App. 471; The People v. Rongetti, 344 Ill. 278; The People v. Quevreaux, 407 Ill. 176; McCray v. Ill. Cent. R. Co., 12 Ill. App. 2d 425. If, however, the witness denies the alleged statements that party calling him must be concluded by his answers, and cannot show, either by the written statements of the witness or by other witnesses, that the witness did, in fact, make those statements, either for the purpose of impeachment or as original evidence of the facts sought to be proved. McCray v. Ill. Cent. R. Co., 12 Ill. App. 2d 425; The People v. Michaels, 335 Ill. 590 .

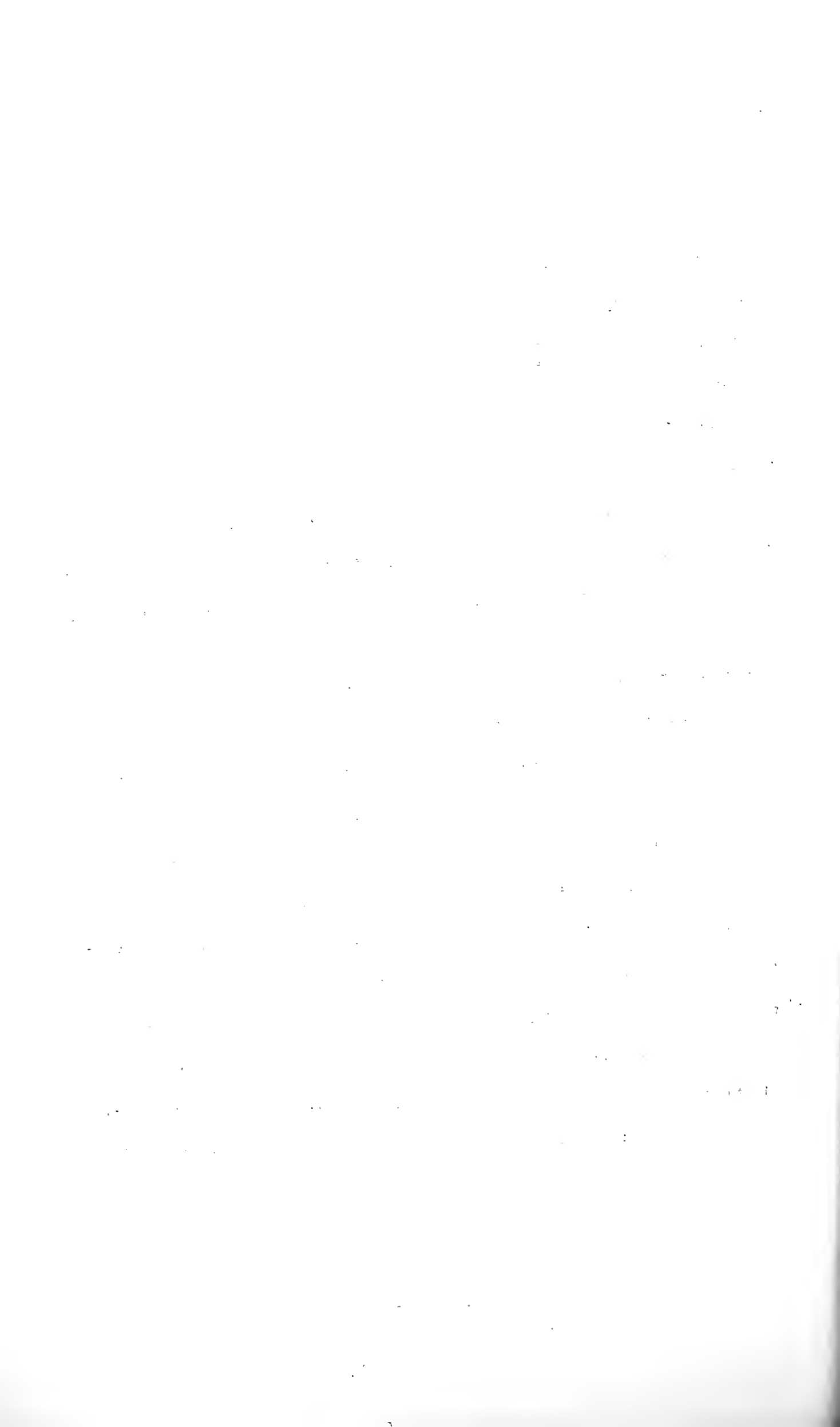
Our courts have continued to state the rule as to cross-examination to be one governed largely by the discretion of the trial court. Muscarello v. Peterson,



20 Ill. 2d 548. In the case of The People v. Wesley, 18 Ill. 2d 138, the court there discussing the McCray v. Illinois Central Railroad Company case said that the implication in the McCray case is that surprise must be claimed at the earliest opportunity. And the court continuing said that it conceded that the party claiming surprise must do so with diligence, but that the ultimate decision as to when such cross examination is to be received is best left to the sound discretion of the trial judge depending upon the facts and circumstances developed at the trial.

The evidence of Sprankle is that he visited with the attorney for the defendant prior to coming to the court house; that the attorney referred to a police report and the statement Sprankle had given the attorney; that they discussed the report and the statement; that the attorney indicated surprise; that 30 or 40 days prior to the trial the attorney called him by telephone and told him he would like to talk to him; that they talked the day before the trial in the office of the attorney and discussed the officer's testimony; that what he told the attorney then was what he testified to at the trial, and that they discussed tire marks. This testimony by Sprankle is not disputed.

If the attorney for the defendant talked with

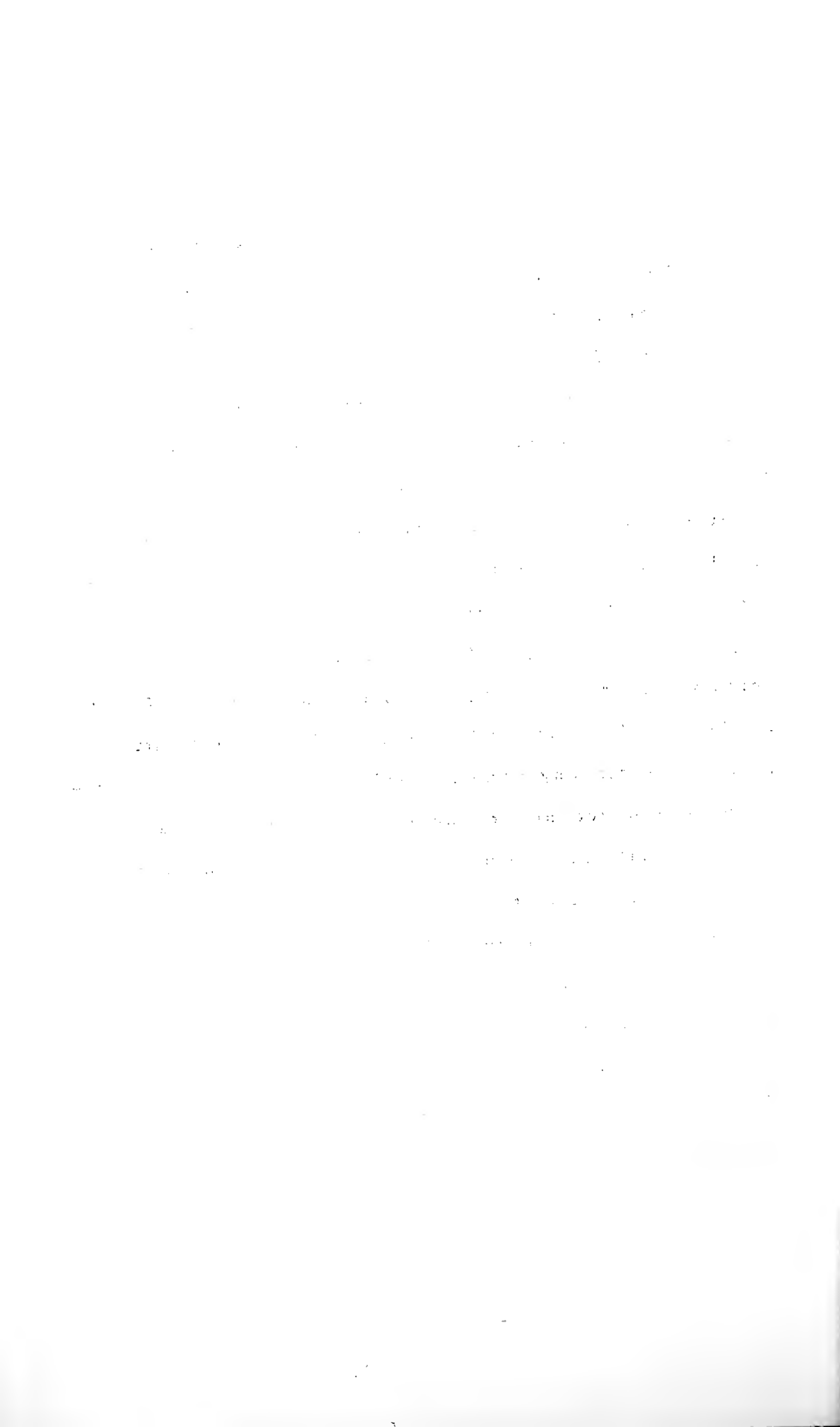


this witness the day before the trial and knew what he would say on the stand and at the trial offered him as a witness for the defendant, he cannot claim surprise and is not entitled to cross examination or to have the witness made a court witness. He vouched for his witness. Here , Sprankle did not recall making certain statements read to him in the offer of proof. Under the rule stated in the McCray v. Illinois Central Railroad Company case, the defendant is concluded by his answers and cannot show, either by the written statement of the witness or by other witnesses that the witness did, in fact, make the statements, either for the purpose of impeachment or as original evidence of the facts sought to be proved. This court holds that there is no error in the trial court's refusal to allow testimony that would have impeached the defendant's witness or in the refusal of the court to make the witness a court witness.

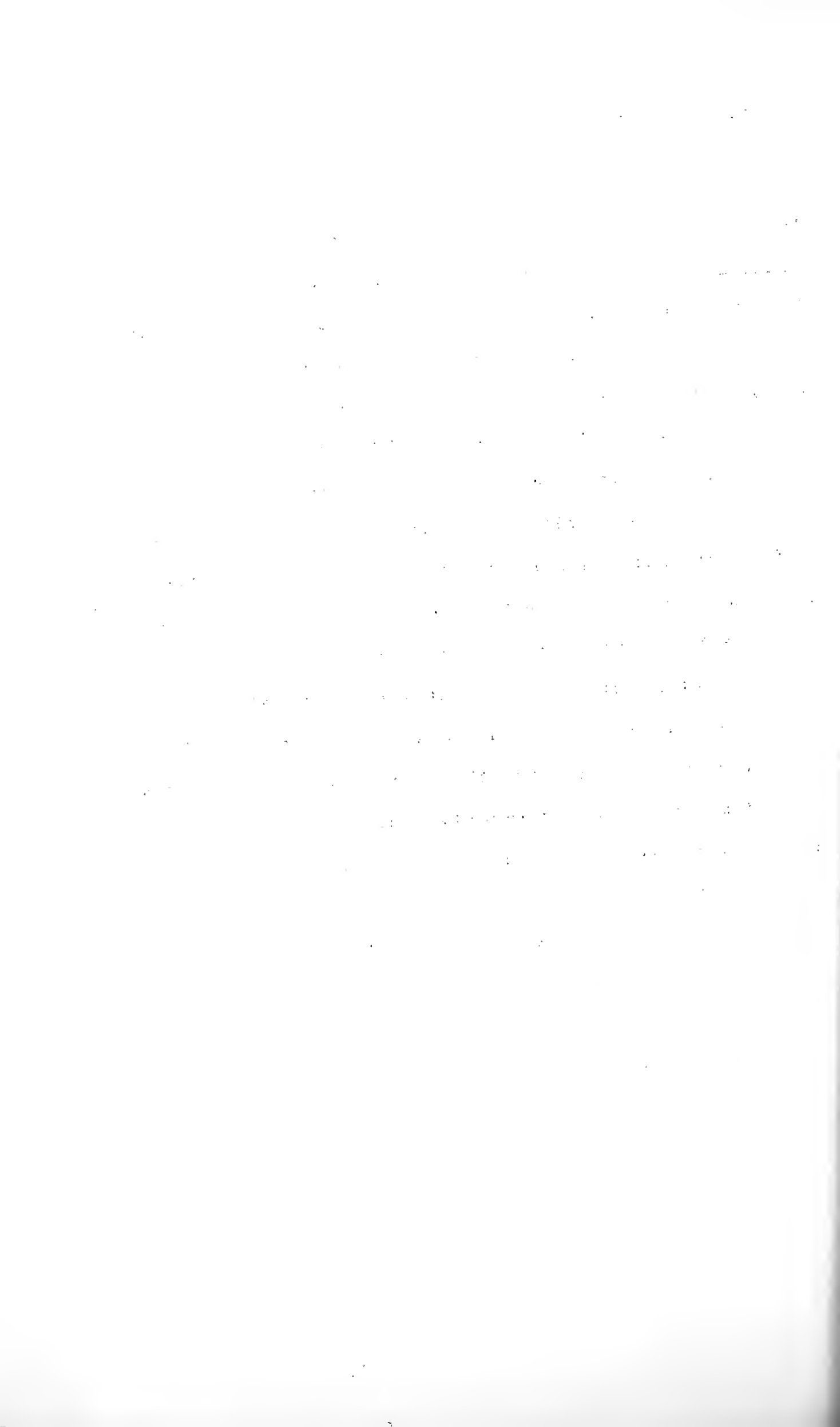
The third point urged is that error was committed by failure to strike the testimony as to the careful habits of the decedent Tarasuik. On that point, plaintiff moved to strike the testimony of the widow, as to careful habits of driving and the court struck such portion of her testimony. Defendant claimed that striking such portion of her testimony was not sufficient and a mistrial should have been

granted. The defendant also contends that the trial court should have permitted the defendant to testify, on the ground that the testimony of the widow removed the incompetency of Russell.

Russell was an incompetent witness under the Dead Man's Act (Chap. 51, Sect. 2, Ill. Rev. Stat. 1961). The widow being a party in interest, testifying as to the careful habits of driving of her deceased husband opened the door for the defendant to testify as to what took place just before and at the time of the collision. In the case of Rouse v. Tomasek, 279 Ill. App. 557, the husband was permitted over objection, to testify as to the careful driving habits of his dead wife, and the Appellate Court held that such testimony made the defendant's proffered testimony as to decedent's conduct at the time of the accident, relevant, material and proper for the purpose of rebutting the presumption that the decedent at the time of the accident was in the exercise of due and ordinary care for her safety. In that case the testimony of the interested party was permitted over the objection of the defendant. Here, the testimony of Mrs. Tarasuik was not objected to, and after counsel for defendant re-tendered the defendant as a competent witness in his own behalf as to the conduct of

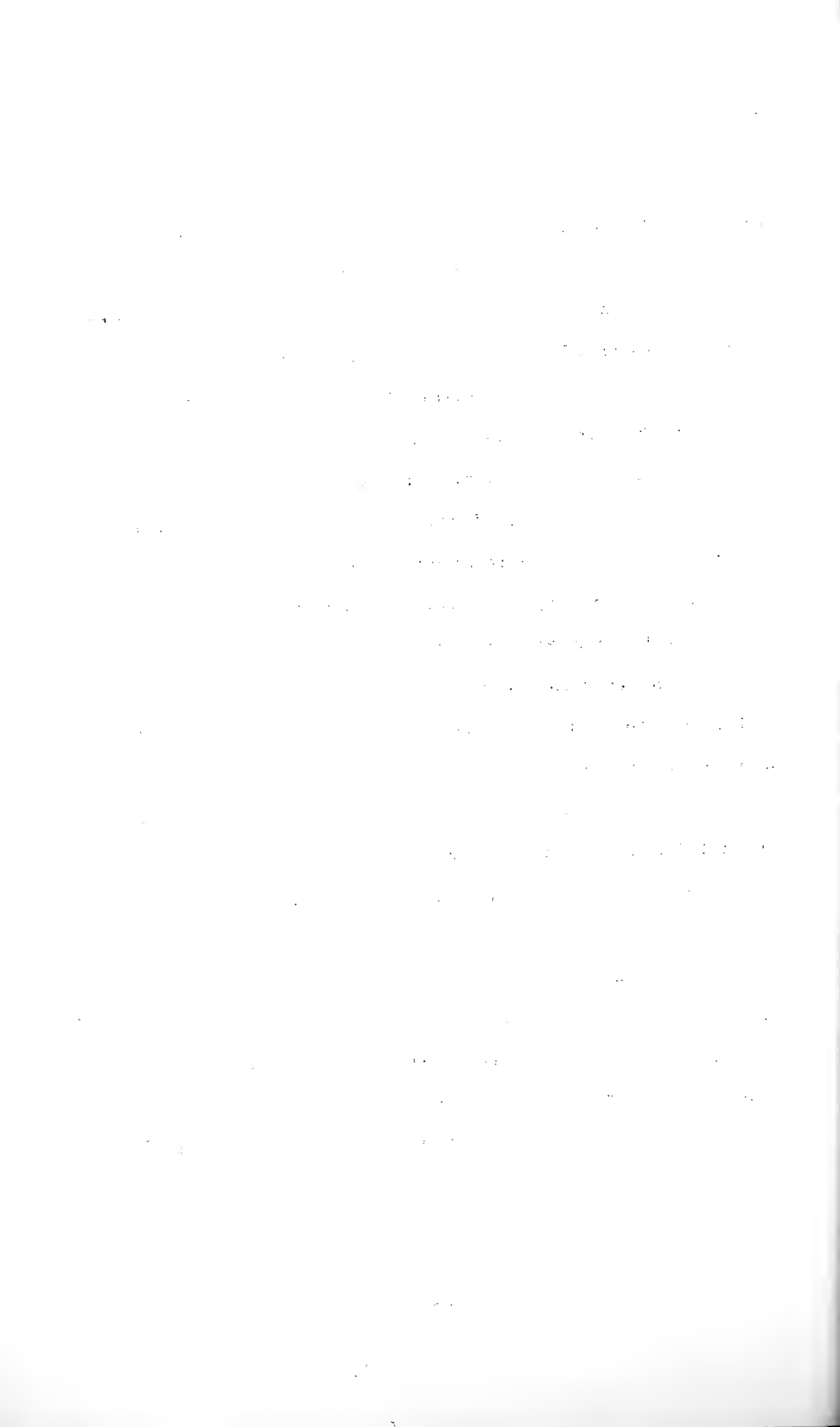


the deceased at the time of the accident under the rule of Rouse v. Tomasek , the plaintiff moved to strike such testimony of Mrs. Tarasuik as to careful driving habits of her deceased husband, and this motion was allowed and the jury instructed to disregard that portion of the testimony. Defendant's offer of proof by the defendant as to what happened was denied. Defendant then asked to withdraw a juror and declare a mistrial and this was denied. Defendant contends that the striking of Mrs. Tarasuik's testimony as to decedent's careful driving habits was not sufficient to remove the testimony from the minds of the jurors. Plaintiff contends that defendant waived this point since he failed to offer any proof as to what the defendant would testify, and that if no offer of proof is made of testimony which is allegedly excluded in error, the alleged error is not preserved for appellate review, Citing Rench v. Bevard , 29 Ill. App. 2d 174. The point seems well taken here. However, if the matter had been properly presented for review, there is not sufficient authority to sustain defendant's contention that a mistrial should have been declared. Again, this is one of those matters that rests in the sound discretion of the trial court and his discretion will not be overruled unless it is clearly



and palpably abused. In this case, the trial court had heard the evidence and observed the witnesses in the witness box. There was other testimony as to the careful driving habits of the deceased. The trial court struck the evidence of the administratrix on this point and instructed the jury to disregard it. The court may, in the course of a trial, when an error is apparent, correct such error and the striking of certain testimony and instructing the jury to disregard it is one form of correction. If the members of the jury followed the instructions of the court, they would disregard testimony they were told to disregard. We see no error in the trial court's failure to permit the defendant to testify, or its denial of the defendant's motion for a mistrial.

The final point urged by defendant is that the trial court permitted improper argument and conduct on the part of counsel for the plaintiff. The instances cited are numerous, that the counsel argued that the defendant was dozing or asleep at the time of the accident, that the defendant's head was bobbing up and down, references to Camelot, King Arthur's Court, Jesus Christ and Doubting Thomas, that the counterclaim of defendant would not have been filed if there had been no orig-

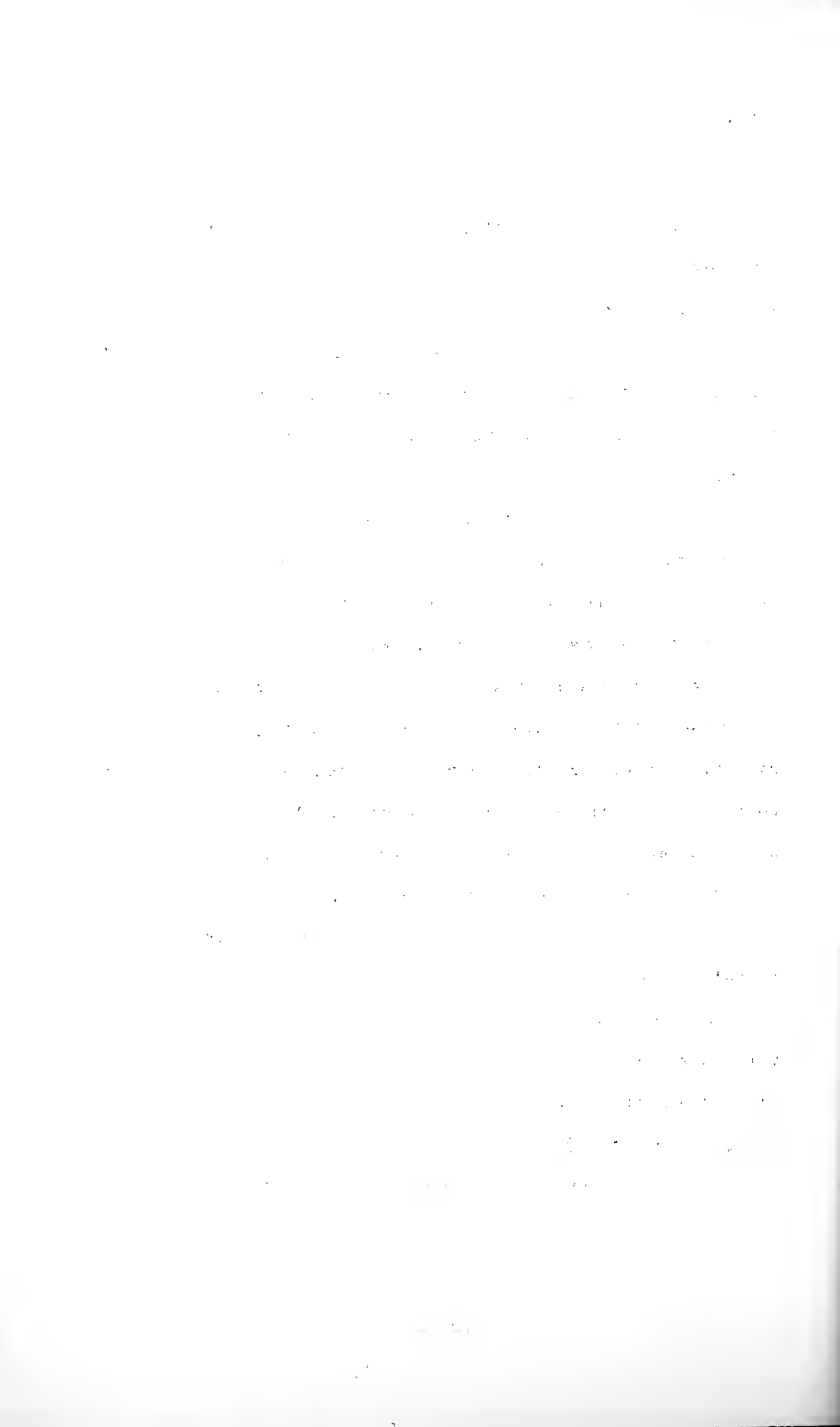


inal suit by the plaintiff, that the plaintiff did not call Officer Sprankle because they wanted to cross examine him, and that counsel for plaintiff in commenting to the jury on the greater weight of evidence to sustain the plaintiff's case, argued in percentage points, and numerous other alleged misstatements as to the evidence by plaintiff's counsel.

This court sees no merit in the contentions of defendant that error was committed by plaintiff's counsel in making references to fictional or historical persons, and their sayings and doings. For hundreds of years, scholars and others have been quoting from the Bible. The story of the doubting disciple Thomas, has become a standard reference to one who doubts. Likewise, reference to characters in Tennyson's classic, "Idylls of the King" has become accepted and standard procedure as reference to certain characteristics of people.

It is true that counsel may not supply facts or inferences in argument not based upon evidence in the record. It is likewise true that while one violation of this rule may not justify reversal, continued and other violations of the rule will justify reversal. Bulleri v. Chicago Transit Authority, 41 Ill. App. 2d 95.

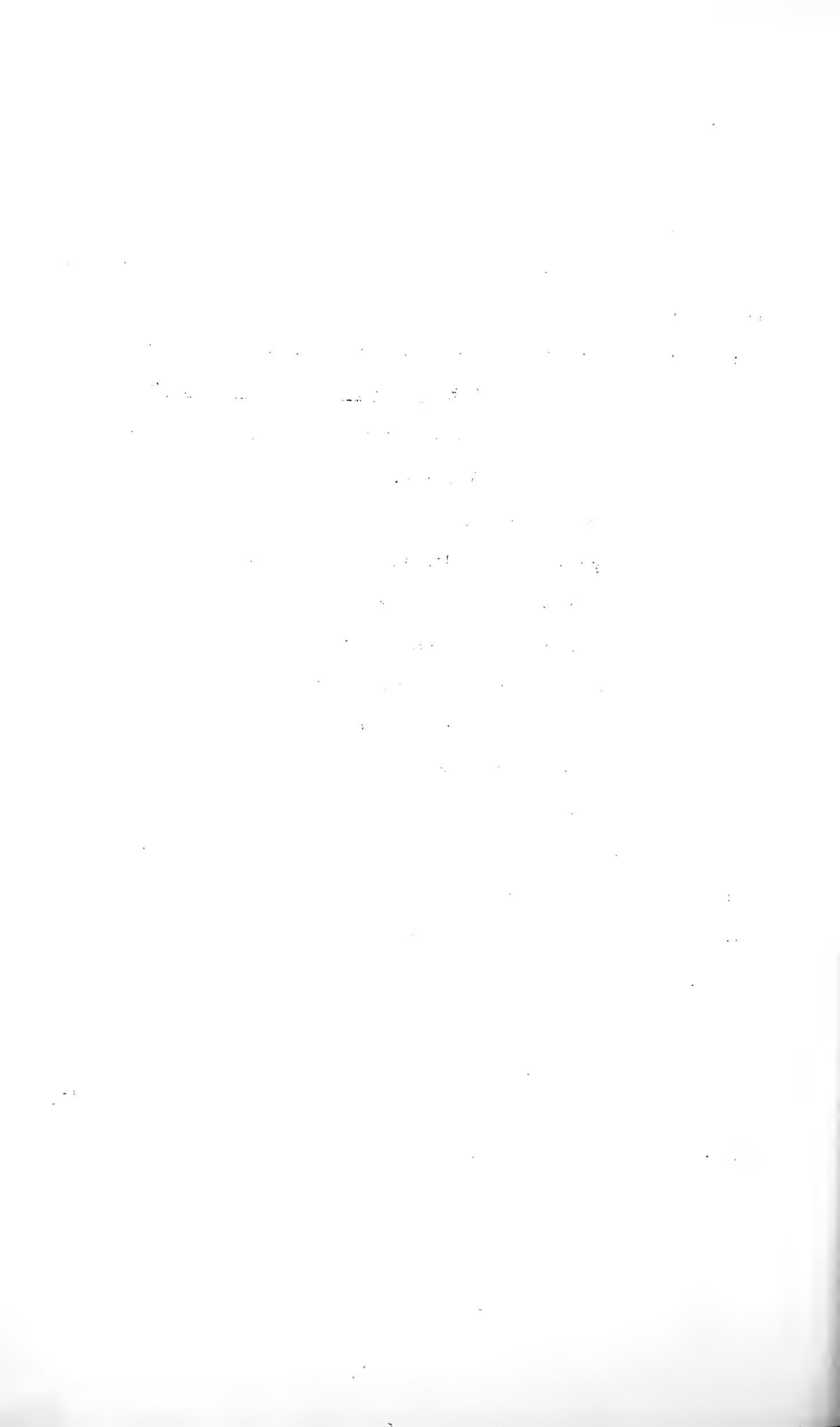
There are numerous cases on the question of



improper argument to a jury. This type of case like so many other cases appealed, must rest upon the facts in each individual case. No hard and fast rule can be laid down that will govern each case. The ultimate goal of a court is a fair and just result. Johnson v. Chicago & N. W. Ry. Co., 9 Ill. App. 2d 340. As said in that case, quoting from The People v. Storer, 329 Ill. 536, 542:-

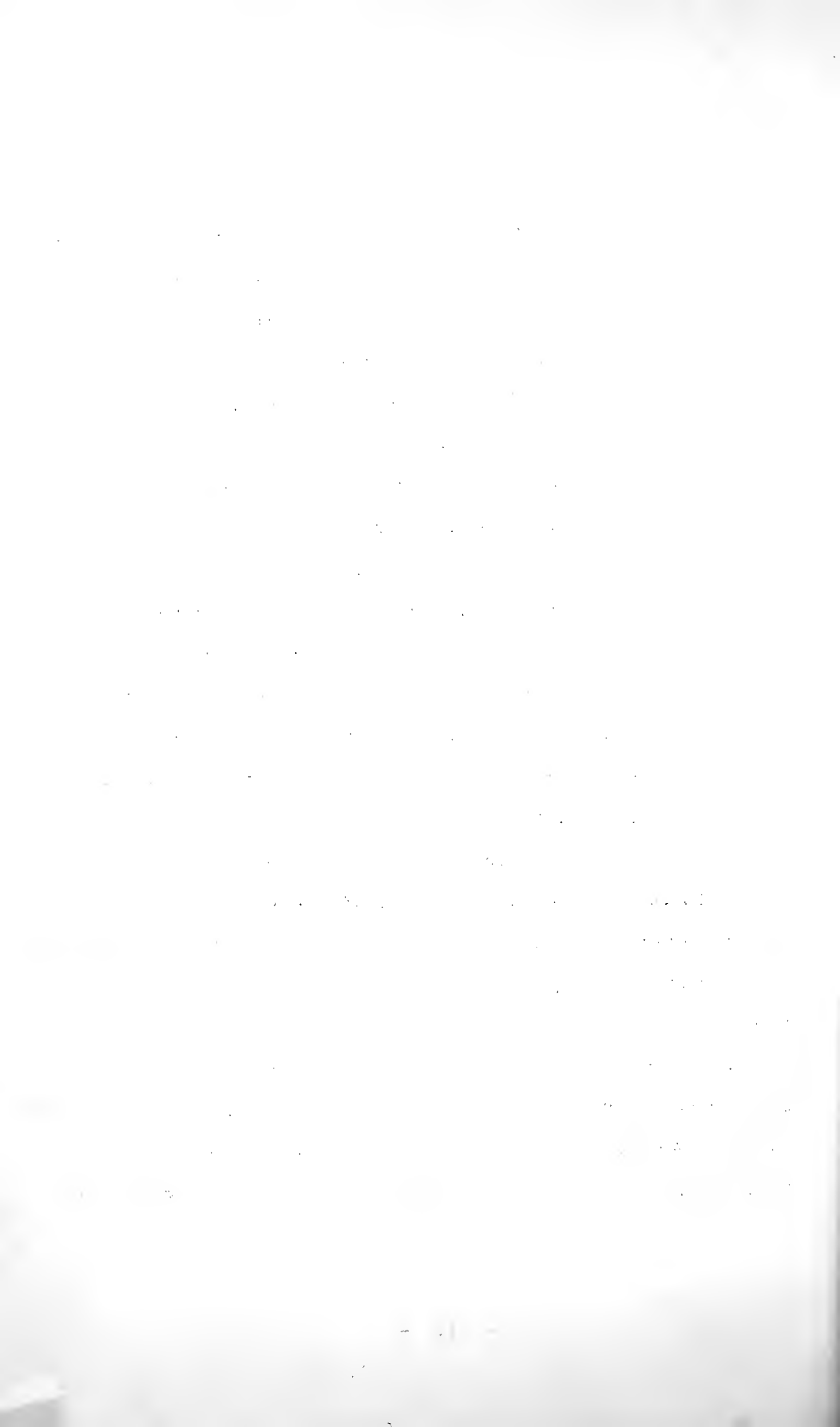
" The object of the review of judgments of trial courts by courts of appellate jurisdiction is not to determine whether the record is free from error but to ascertain whether a just conclusion has been reached, founded upon competent and sufficient evidence, in a trial in which no error has occurred which might be prejudicial to the defendant's rights."

Ordinarily, counsel is allowed wide latitude in inferences he may deduce from the evidence. If the rule with reference to improper references were applied strictly, it would have a tendency to deprive litigants of the right to have their cases argued, for the prudent attorney would in such case forego argument rather than risk reversible error. Forslund v. Chicago Transit Authority, 9 Ill. App. 2d 290. In that case, quoting from Commonwealth Elec. Co. v. Rose, 214 Ill. 545, the court said at page 561:-



"'Counsel may arraign the conduct of the parties, and impugn, excuse, justify, or condemn motives, so far as they are developed in evidence, or assail the credibility of witnesses when it is impeached by direct evidence, or by inconsistency, or incoherency of their testimony, their manner to testifying, their appearance upon the stand, or by circumstances. " He may argue such conclusions from the testimony as he pleases, provided he does not misquote witnesses."It has been said: "Just and fierce invective, when based upon the facts in evidence and all legitimate inferences therefrom, is not discountenanced by the courts."'"

Taking all the alleged errors assigned by defendant as to the remarks and conduct of plaintiff's counsel, we see no reversible error. As this court has said in Kosowski v. McDonald Elevator Co., 33 Ill. App. 2d 386, the ultimate goal of a court is a fair and just result and when it is clear that the case has been fairly tried and that a judgment is clearly right, the judgment should be affirmed by an Appellate Court. As said in that case, this court is not at liberty to disturb a verdict of the jury in the absence of conviction



on the part of this court that the verdict is against the manifest weight of the evidence. In this case, this court cannot say that the verdict of the jury is against the manifest weight of the evidence. We do not commend or approve the definition of the greater weight of the evidence by percentages. Yet, that alone, is not sufficient to warrant reversal of the judgment. Reference to the reason for filing of defendant's counterclaim was unwarranted and irrelevant to the issues before the jury, but again, this error is not sufficient to warrant reversal. Many of the others we regard as harmless errors, such as are committed in every trial. Taking the record as a whole, it would seem that substantial justice was done and that the verdict of the jury was based upon competent evidence, and that the remarks of counsel for plaintiff were not so prejudicial as to amount to cause for reversal.

For the reasons stated the judgment will be affirmed.

Affirmed.

Dove, P. J. and Wright J. concur.

Publish Abstract only.

FILED

JUN 3 1964

James T. McLaughlin

CLERK OF THE APPELLATE COURT
FIFTH DISTRICT OF ILLINOIS

